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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 515

BEMIS BRO. BAG COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 12, 1932

CERTIORARI GRANTED JANUARY 23, 1933

(37,212)

(37,212)

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[fol. 1] Citation, in usual form, showing service on Claude M. Crooks, filed December 22, 1931, omitted in printing.

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

#8451

BEMIS BRO. BAG COMPANY, a Corporation, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

PETITION—Filed Jan. 2, 1929

Now comes the above named plaintiff and states as follows:

1. Plaintiff is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, having its principal office and place of business in and being a resident of the City of St. Louis and State of Missouri, in the Eastern Division of the Eastern Judicial District of Missouri.

2. This is a suit for the recovery of internal revenue taxes erroneously or illegally assessed and collected. George H. Moore, the Collector of Internal Revenue, by whom such taxes were collected, is not in office as Collector of Internal Revenue at this time.

3. For its first cause of action plaintiff says:

(a) In due time, as required by law, plaintiff filed in the office of the Collector of Internal Revenue at St. Louis, Missouri, its return of income received by it during the calendar year 1918, and its return of invested capital for said year and of its income and invested capital for the

pre-war period for the assessment of the income, war and excess profits taxes imposed by the Revenue Act of 1918, showing a total tax liability amounting to $3,947,513.30, which amount plaintiff duly paid in approximately equal quarterly installments, one on or about the 15th day of March, one on or about the 15th day of June, one on or about the 15th day of September, and one on or about the 15th day of December, 1919.

(b) Thereafter the Commissioner of Internal Revenue audited plaintiff's said return and on or about the month of March, 1920, assessed additional taxes for said year 1918, amounting to $99,214.98, which amount plaintiff duly paid on June 29, 1920, making the total amount of said taxes assessed against plaintiff and paid by plaintiff for said calendar year 1918, the sum of $6,046,728.28.

[fol. 3] (c) Thereafter and in due time, to-wit, on the 12th day of January, 1924, within less than five years after its return for said year was due, and within less than four years after the payment of said additional taxes assessed as aforesaid was made, plaintiff duly filed its claim for refund of part of the taxes paid by it for said year, copy of which claim is hereto attached, marked Exhibit "A." Attached to said claim for refund and by reference made a part thereof was a printed brief submitted with plaintiff's claim for refund theretofore filed for the year 1917. Said claim for refund claimed as the reasons for said refund that the excess profits tax and the war profits tax — the year 1918 should be assessed under the provisions of Section- 327 and 328 of the Revenue Act of 1918 and stated among others: (1) That at the date of the organization of the company, good will, together with tangible assets was transferred to the corporation for its capital stock and no calculation of the value of the property turned in for capital stock can be made, and in said claim it was stated as to said item that "if the value of the respective kinds of property could be satisfactorily determined this company would be entitled to additional invested capital." Also, (2), that all of plaintiff's printing plate equipment, including the metal, has been charged to expense and the original cost cannot be determined and assessment under said sections was claimed because plaintiff said the cost of these items, which should have been included in in-

vested capital if it could be determined, could not be determined.

(d) On December 13, 1926, plaintiff addressed to the Commissioner of Internal Revenue a letter concerning its claims for refund for the years 1917, 1918 and 1919, copy of which is hereto attached marked Exhibit "B," in which the following claim was made:

"(b) Additions to Surplus Account. In the claim heretofore filed we presented a list of capital items which had been charged to expense. This list did not purport to be exhaustive. If special assessment is denied the items listed should be restored to invested capital and the company's surplus should be increased accordingly. These items are as follows:"

Thereafter appears a list of items, which includes the printing equipment charged to expense upon which an increase in invested capital of $851,375.50 is claimed and the intangibles acquired at date of organization upon which an increase of invested capital of $227,500 is made.
[fol. 4] In said letter it is also asserted that "the cost of the metal alone in the patterns and plates together with the type in this equipment at the minimum price per pound which has ever prevailed since the Company started to accumulate this equipment was not less than $300,000."

(e) On April 12, 1927, plaintiff mailed to the Commissioner of Internal Revenue letter, concerning claims for refund for the years 1917 to 1919 inclusive, copy of which is hereto attached marked Exhibit "C," in which the opening paragraph is as follows:

"This letter is written in response to your request made at conference in your office on February 23, for more detailed information on some of the facts presented to you. These facts were and are urged as elements of the right to special assessment and they are also urged as a basis for allowance of additional invested capital. We are unable to disclose and sustain the full invested capital to which the company is entitled by virtue of the facts hereinafter stated and heretofore presented to you. The invested capital to which we have made claim is the minimum invested capital to which the company is entitled."

Thereafter appear the details concerning the acquisition of said printing equipment and the cost of the metal contained therein, and the acquisition of said good will acquired at organization.

(f) On December 17, 1927, the Commissioner of Internal Revenue addressed to plaintiff the letter hereto attached marked Exhibit "D"; as shown by said letter the Commissioner has determined that the cost of the items last above mentioned can be determined to his satisfaction and that the cost of the metal in said printing equipment possessed by the plaintiff on December 31, 1917, was the sum of $129,372.93, and the cost of the good will acquired by plaintiff at the date of its organization with its capital stock was, to-wit, the sum of $68,134.27, and that because of the decrease of the tax for the year 1917, (for which also claim for refund was filed,) due among other reasons to the amounts of invested capital by virtue of said last two mentioned items, the reduction of invested capital for the year 1918 because of the tax for the year 1917 should also be decreased. That as shown by said Exhibit "D" the Commissioner of Internal Revenue has found that said taxes were overassessed and overpaid by plaintiff for said year in the sum of $14,054.18, but refuses to refund said overpayment for the following reasons stated in said letter hereto attached, marked Exhibit "D":

[fol. 5] "Inasmuch as computation of your tax liability for 1918 and 1919 under the provisions of Section 327 and 328 of the Revenue Act of 1918 is denied and your claim for the refunding of $1,270,907.97 for 1918 is confined to that point, it will be rejected in full in the next schedule to be approved by the Commissioner.

"The overassessments indicated for 1918 and 1919, not being covered by proper claims are barred by the Statute of Limitations and cannot be allowed."

(g) Plaintiff's correct net income for said year 1918 was the sum of $10,154,059.75, of which income the sum of $46,737.32 was interest upon United States obligations exempt from the excess profits tax and war profits tax for said year but not exempt from income tax; its correct invested capital for said year was the sum of $22,070,422.75; its average invested capital for the prewar period was $10,094,253.54, and

its average net income for the prewar period was $2,091,525.88. Plaintiff's excess profits credit for the excess profits tax was $1,768,633.82 and its war profits credit for the war profits tax was $3,292,142.80, and the total amount of plaintiff's liability for excess profits, war profits and income taxes for said year was, to-wit, $6,043,428.22, against which it was entitled to a credit of $10,754.12, profits taxes paid to Canada for said year. The net excess profits, war profits and income taxes owing by the plaintiff to the United States for said year was $6,032,674.10. As stated above there was assessed against plaintiff for said taxes and plaintiff paid therefor the sum of $6,046,728.28, whereby plaintiff was overassessed and overpaid the sum of $14,054.18. All of the facts and figures stated above in this paragraph are in accordance with the findings of the Commissioner of Internal Revenue, as shown by his said letter hereto attached, marked Exhibit "D".

(h) The Commissioner of Internal Revenue rejected plaintiff's said claim for refund by his said letter dated December 17, 1927, for the reasons above stated. Plaintiff states that the facts as found by the Commissioner of Internal Revenue as reasons and basis for said overassessment were duly stated in said claim for refund, in connection with which facts it was asserted in said claim for refund that if the cost of such items could be determined such cost should be allowed as invested capital. That said claim for refund was a proper claim for the refund resulting from the allowance of the cost of said items as invested capital and that the Commissioner of Internal Revenue erroneously and improperly refuses to make said refund.

[fol. 6] (i) Wherefore plaintiff prays judgment against the United States on this its first cause of action for the amount of the overpayment for said year 1918 in the amount thereof determined by the Commissioner of Internal Revenue, to-wit, for the sum of $14,054.18, with interest thereon at the rate of six per cent per annum from the 29th day of June, 1920, as provided by law, together with its costs herein expended.

4. For a further and other cause of action, plaintiff says:

(a) In due time, as required by law, plaintiff filed in the office of the Collector of Internal Revenue at St. Louis, Mis-

souri, its return of income received by it during the calendar year 1919, and its return of invested capital for said year for the assessment of the excess profits tax and income tax imposed by the Revenue Act of 1918, showing a total tax liability for said year amounting to $2,965,124.51, which amount plaintiff duly paid in approximately equal quarterly installments, one on or about the 15th day of March, one on or about the 15th day of June, one on or about the 15th day of September, and one on or about the 15th day of December, 1920.

(b) Thereafter the Commissioner of Internal Revenue audited plaintiff's said return and on or about the month of October, 1920, assessed additional taxes for said year 1919 amounting to $34,630.31, which amount plaintiff duly paid on December 16, 1920, making the total amount of said taxes assessed against plaintiff and paid by plaintiff for said calendar year 1919, the sum of $2,999,754.82.

(c) Thereafter, and in due time, to-wit, on the 10th day of December, 1924, within less than five years after its return for said year was due and within less than four years after the payment of said additional taxes assessed as aforesaid was made, plaintiff filed its claim for refund of part of the taxes paid by it for said year, copy of which claim is hereto attached marked Exhibit "E". Attached to said claim for refund and by reference made a part thereof, was a printed brief submitted with plaintiff's claim for refund theretofore filed for the year 1917. Said claim for refund claimed as the reasons for said claim for refund that the excess profits tax for the year 1919 should be assessed under the provisions of Sections 327 and 328 of the Revenue Act of 1918 and stated among others: (1) That at the date of the organization of the company, good will, together with tangible assets was transferred to the corporation for its capital stock and no calculation of the value of the property [fol. 7] turned in for capital stock can be made, and in said claim it was stated as to said item that "if the value of the respective kinds of property could be satisfactorily determined this company would be entitled to additional invested capital." Also, (2) that all of plaintiff's printing plate equipment, including the metal, has been charged to expense and the original cost cannot be determined and assessment under said sections was claimed because plaintiff said the

cost of these items which should have been included in invested capital if it could be determined, could not be determined.

(d) On December 13, 1926, plaintiff addressed to the Commissioner of Internal Revenue the letter concerning its claims for refund for the years 1917, 1918 and 1919, copy of which is hereto attached marked Exhibit "B", in which the following claim was made:

"(b) Additions to Surplus Account. In the claim heretofore filed we presented a list of capital items which had been charged to expense. This list did not purport to be exhaustive. If special assessment is denied the items listed should be restored to invested capital and the company's surplus should be increased accordingly. These items are as follows:"

Thereafter appears a list of items, which includes the printing equipment charged to expense upon which an increase in invested capital of $851,375.50 is claimed and the intangibles acquired at date of organization upon which an increase of invested capital of $227,500 is made.

In said letter it is also asserted that "the cost of the metal alone in the patterns and plates, together with the type in this equipment at the minimum price per pound which has ever prevailed since the Company started to accumulate this equipment was not less than $300,000."

(e) On April 12, 1927, plaintiff mailed to the Commissioner of Internal Revenue letter, concerning claims for refund for the years 1917 to 1919 inclusive, copy of which is hereto attached marked Exhibit "C", in which the opening paragraph is as follows:

"This letter is written in response to your request made at conference in your office on February 23, for more detailed information on some of the facts presented to you. These facts were and are urged as elements of the right to special assessment and they are also urged as a basis for allowance of additional invested capital. We are unable [fol. 8] to disclose and sustain the full invested capital to which the company is entitled by virtue of the facts hereinafter stated and heretofore presented to you. The invested capital to which we have made claim is the minimum invested capital to which the company is entitled."

Thereafter appear the details concerning the acquisition of said printing equipment and the cost of the metal contained therein, and the acquisition of said good will acquired at organization.

(f) On December 17, 1927, the Commissioner of Internal Revenue addressed to plaintiff the letter hereto attached marked Exhibit "D"; as shown by said letter the Commissioner has determined that the cost of the items last above mentioned can be determined to his satisfaction and that the cost of the metal in said printing equipment possessed by the plaintiff on December 31, 1917, was the sum of $129,-372.93, and the cost of the good will acquired by plaintiff at the date of its organization with its capital stock was, to-wit, the sum of $68,134.27, and that because of the decrease of the tax for the year 1918, (for which also claim for refund was filed), due among other reasons to the amounts of invested capital by virtue of said last two mentioned items, the reduction of invested capital for the year 1919 because of the tax for the year 1918 should also be decreased. That as shown by said Exhibit "D" the Commissioner of Internal Revenue has found that said taxes were overassessed and overpaid by plaintiff for said year in the sum of $9,073.15, but refuses to refund said overpayment for the following reasons stated in said letter hereto attached, marked Exhibit "D":

"Inasmuch as computation of your tax liability for 1918 and 1919 under the provisions of Sections 327 and 328 of the Revenue Act of 1918 is denied and your claim for the refunding of $1,270,907.97 for 1918 is confined to that point, it will be rejected in full in the next schedule to be approved by the Commissioner.

"Your claim for the computation of your tax liability for 1919 under the provisions of Sections 327 and 328 has already been rejected.

"The overassessments indicated for 1918 and 1919, not being covered by proper claims are barred by the Statute of Limitations and cannot be allowed."

(g) Plaintiff's correct net income for said year 1919 was the sum of $9,594,386.01, of which income the sum of $49,-[fol. 9] 284.17 was interest upon United States obligations exempt from the excess profits tax for said year but not ex-

empt from income tax; its correct invested capital for said year was the sum of $25,830,117.28; its excess profits credit for the excess profits tax was $2,069,409.38, and the total amount of plaintiff's liability for excess profits and income taxes for said year was, to-wit, $3,105,911.23, against which it was entitled to a credit of $115,229.56 profits taxes paid to Canada for said year. The net excess profits and income taxes owing by the plaintiff to the United States for said year 1919 was $2,990,681.68. As stated above, there was assessed against plaintiff for said taxes and plaintiff paid therefor the sum of $2,999,754.82, whereby plaintiff was overassessed and overpaid the sum of $9,073.15.

(h) The Commissioner of Internal Revenue rejected plaintiff's said claim for refund by his said letter dated December 17, 1927, for the reasons above stated. Plaintiff states that the facts as found by the Commissioner of Internal Revenue as reasons and bases for said overassessment were duly stated in said claim for refund, in connection with which facts it was asserted in said claim for refund that if the cost of such items could be determined such cost should be allowed as invested capital.

(i) Wherefore plaintiff prays judgment against the United States on this, its second cause of action for the amount of the overpayment for said year 1919, in the amount thereof determined by the Commissioner of Internal Revenue, to-wit for the sum of $9,073.15, with interest thereon at the rate of six per cent per annum from the 16th day of December, 1920, as provided by law, together with its costs herein expended.

Spencer M. Thomas, Lowenhaupt & Waite, Attorneys for Plaintiff.

Duly sworn to by J. S. Bemis. Jurat omitted in printing.

[fol. 10] IN UNITED STATES DISTRICT COURT

ANSWER—Filed May 14, 1931

Comes now the United States of America, defendant in the above entitled cause, by its attorney, Claude M. Crooks,

Assistant United States Attorney for the Eastern District of Missouri, and for answer to plaintiff's petition:

Admits the allegations in Paragraph 1.

Answering Paragraph 2, defendant admits that George H. Moore, Collector of Internal Revenue, by whom the taxes were collected, referred to in the petition, is not now in office as Collector of Internal Revenue, and was not at the time this suit was instituted.

Each and every other allegation contained in said petition, except those admitted above, are hereby denied.

Wherefore, defendant having fully answered, prays to go hence with its proper costs.

Claude M. Crooks, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

AGREED STATEMENT OF FACTS—Filed May 14, 1931

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other or further evidence not inconsistent with the facts herein stipulated to be true:

I

On March 15, 1919, plaintiff filed a tentative return, and on or about May 15, 1919, filed the completed corporation income and profits tax return for the calendar year 1918 with the Collector of Internal Revenue at St. Louis, Missouri, showing a total tax liability for said year amount-[fol. 11] ing to $5,947,513.30, which amount was duly assessed and plaintiff duly paid as follows:

$1,496,564.55 on March 15, 1919;
1,477,192.10 on June 15, 1919;
1,486,878.33 on Sept. 15, 1919;
1,486,878.32 on Dec. 15, 1919.

II

The Commissioner of Internal Revenue audited plaintiff's return for said year 1918 and in May, 1920, assessed

additional income and excess profits taxes for said year 1918, amounting to $99,214.98 of which amount $98,549.28 was paid on June 30, 1920, and $665.70 was paid by credit applied by the Commissioner of Internal Revenue on May 18, 1922, which credit was due plaintiff on an overpayment of taxes for a prior year, making the total amount of said taxes assessed against and paid by plaintiff for the year 1918, $6,046,728.28.

III

Thereafter, on the 29th day of February, 1924, plaintiff filed with the Collector of Internal Revenue at St. Louis, Missouri, its claim for refund of part of the taxes paid by it for said year 1918. A copy of said claim for refund is hereunto attached, marked Exhibit "A" and made a part hereof, (with the exception of the details of calculation of the cost of printing equipment set forth at the end of said claim for refund as Exhibit 1 thereto, which details are deemed immaterial to this action).

IV

On March 13, 1920, plaintiff filed, in the office of the Collector of Internal Revenue at St. Louis, Missouri, its corporation income and profits tax return for the calendar year 1919, showing a total tax liability for said year or $2,965,-124.51, which amount plaintiff duly paid in equal quarterly installments of $741,281.13 each on March 16, 1920, June 15, 1920, September 15, 1920 and December 15, 1920, respectively.

V

Thereafter, the Commissioner of Internal Revenue audited the plaintiff's said return for said year 1919 and in November, 1920, assessed additional income and excess profits taxes for said year 1919 in the sum of $34,630.31, which amount the plaintiff duly paid on December 16, 1920, making the total amount of said taxes assessed against and paid by plaintiff for said year 1919, $2,999,754.82.

[fol. 12]

VI

Thereafter, on December 12, 1924, plaintiff filed with the Collector of Internal Revenue at St. Louis, Missouri, its claim for refund of part of the taxes paid by it for said

year 1919. A copy of said claim for refund is hereunto attached, marked Exhibit "B" and made a part hereof, (with the exception of the details of the calculation of the cost of printing equipment set forth at the end of said claim for refund as Exhibit 1 thereto, which details are deemed immaterial to this action).

VII

Under date of October 30, 1926, the Commissioner of Internal Revenue addressed a letter to plaintiff, which was duly received by plaintiff, with reference to said claim for refund for 1919. A copy of said letter is hereunto attached, marked Exhibit "C" and made a part hereof.

VIII

Under date of November 27, 1926, the Commissioner of Internal Revenue addressed a letter to plaintiff, which was duly received by plaintiff, with reference to said claim for refund for 1918. A copy of said letter is hereunto attached, marked Exhibit "D" and made a part hereof.

IX

On December 13, 1926, plaintiff addressed to the Commissioner of Internal Revenue a letter of protest concerning its claims for refund for the years 1917, 1918 and 1919, which letter was duly received by said Commissioner. A copy of said letter is hereunto attached, marked Exhibit "E" and made a part hereof.

X

After receipt of said letter of December 13, 1926, the Commissioner of Internal Revenue arranged a conference for the discussion of plaintiff's claims set out in said claims for refund for 1918 and 1919. Said conference was held on [held on] February 25, 1927, and there were present representatives of said Commissioner of Internal Revenue, and plaintiff's attorney. At said conference said representatives of said Commissioner of Internal Revenue requested additional detailed information on some of the facts presented by plaintiff concerning its claims in said claims for refund.

[fol. 13]

XI

On April 12, 1927, plaintiff mailed to the Commissioner of Internal Revenue a letter concerning its claims for refund for the years 1917, 1918 and 1919, which letter was duly received by said Commissioner. A copy of said letter is hereunto attached, marked Exhibit "F" and made a part hereof.

XII

Thereafter, the Commissioner of Internal Revenue transmitted to the Internal Revenue Agent in Charge, St. Louis, Missouri, copies of said claims for refund with the request that he examine into the facts and submit his report thereon. Internal Revenue Agent Edward P. Beffa was assigned to the work and made an examination of plaintiff's books and records and prepared a report thereon, which report was transmitted to said Commissioner of Internal Revenue by the Internal Revenue Agent in Charge with a letter of transmittal dated July 27, 1927. A copy of said letter of transmittal is attached hereto, marked "Exhibit G" and made a part hereof.

XIII

On December 17, 1927, the Commissioner of Internal Revenue addressed a letter to the plaintiff, which letter was duly received by plaintiff, in which it was stated that plaintiff had overpaid its taxes for the year 1918 in the amount of $14,054.18, and for the year 1919 in the amount of $9,073.15, but that such overpayments were barred by the statute of limitations. A copy of said letter is hereunto attached, marked Exhibit "H" and made a part hereof.

XIV

Thereafter, on December 22, 1927, plaintiff addressed to the Commissioner of Internal Revenue a letter concerning its claims for refund for the years 1917 and 1919, which latter was duly received by the Commissioner. A copy of said letter is hereunto attached, marked Exhibit "I" and made a part hereof.

XV

On January 20, 1928, the Commissioner of Internal Revenue addressed a letter to plaintiff, which letter was duly

received by plaintiff, in answer to plaintiff's said letter of December 22, 1927. A copy of said letter is hereunto attached, marked Exhibit "K" and made a part hereof.

[fol. 14] XVI

Copies of the tentative return and of the completed corporation income and profits tax return of the taxpayer for the year 1918, filed by the taxpayer as stated in paragraph I of this stipulation, are hereunto annexed, marked Exhibits "L" and "M" respectively, and made a part hereof. (The schedules attached to the completed corporation income and profits tax return are omitted from the copy.)

XVII

Copy of the corporation income and profits tax return of the taxpayer for the year 1919, filed by the taxpayer as stated in paragraph IV of this stipulation, is hereunto annexed, marked Exhibit "N" and made a part hereof.

XVIII

Plaintiff alleges in its complaint that it is entitled to recover an overpayment of its taxes for the year 1918 on the ground that its invested capital for that year is a larger amount than was stated in its return for 1918, and in the Commissioner's audit thereof referred to in paragraph II of this stipulation.

Plaintiff alleges in its complaint that it is entitled to recover an overpayment of its taxes for the year 1919 on the ground that its invested capital for that year is a larger amount than was stated in its return for 1919, and in the Commissioner's audit thereof referred to in paragraph V of this stipulation.

If the plaintiff, within the time provided by law, filed claims for refund for the years 1918 and 1919, respectively, which under the law were sufficient to be the required preliminary for the maintenance of this action on that ground, above stated, then plaintiff will be entitled to judgment for the year 1918 in the amount of $14,054.18 with interest, and for the year 1919 in the amount of $9,073.15 with interest.

If the claims for refund filed by the plaintiff for the years 1918 and 1919, respectively, were not sufficient under

the law to be the required preliminary for the maintenance [fol. 15] of this action on that ground, then defendant will be entitled to judgment dismissing this action.

Claude M. Crooks, Asst. U. S. Atty., Attorney for Defendant. Spencer M. Thomas, N. S. Waite, A. Lowenhaupt, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

JUDGMENT—September 23, 1931

Now the Court having considered the issues herein joined, doth announce its oral opinion finding such issues in favor of defendant and against plaintiff and doth award judgment accordingly.

It is, therefore, pursuant to the finding and award of judgment as aforesaid, Ordered and Adjudged that plaintiff, Bemis Bros. Bag Company, a corp., take nothing by its suit in this behalf against defendant, United States of America, and that said defendant go hence without day and recover of and from said plaintiff its costs and charges herein expended, for all of which costs and charges let execution issue against said plaintiff upon præcipe filed therefor by defendant.

IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL SUBMITTED—September 28, 1931

Now come the parties by their respective attorneys, and now plaintiff by leave of Court files herein its motion for a new trial; whereupon said motion is submitted to the Court without argument.

IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR NEW TRIAL—December 5, 1931

Now, the Court having considered the motion of plaintiff for a new trial, doth Order that such motion be, and the same is hereby, overruled.

[fol. 16] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed Dec. 22, 1931

To the Honorable Charles B. Faris, judge of said court:

Now comes Bemis Bros. Bag Company, a corporation, plaintiff in the above entitled cause, by Spencer M. Thomas and Abraham Lowenhaupt, its attorneys, and feeling itself aggrieved by the final judgment of this Court, entered on the 23rd day of September, 1931, and the overruling of plaintiff's motion for a new trial on the 5th day of December, 1931, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Eighth Circuit for the reasons set forth in its assignment of errors filed herewith, and said Bemis Bros Bag Company, prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated be sent to the United States Circuit Court of Appeals for the Eighth Circuit, under the rules of such Court in such cases made and provided.

And your petitioner further prays that the proper order, relating to the required security to be required of it, be made.

Abraham Lowenhaupt, Spencer M. Thomas, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Dec. 22, 1931

Now comes the plaintiff in the above-entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause from the judgment rendered by this Honorable Court in said cause.

I

That the judgment of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri is contrary to the law and the evidence in this, to wit:

It is stipulated that plaintiff is entitled to the refund of said overpayment of taxes in suit, if the claims for refund filed by plaintiff were sufficient. The suit is for overpayments of taxes for 1918 and 1919 resulting from plain-
[fol. 17] tiff's right to additional invested capital in the calculation of its excess-profits tax on account of the printing equipment purchased and charged to expense and goodwill purchased in 1885 and not set up on the accounts. The facts concerning these items were set forth in plaintiff's original claim for refund filed in due time (exhibits A and B of the agreed statement of facts). The Court found that the only facts stated on said claims for refund were the facts stated upon the face of the form provided by the Treasury Department and in error overlooked or disregarded the facts stated in the exhibits attached to said forms and constituting a part of said claims.

II

That the judgment of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri is contrary to the facts and the law in the case in this, to-wit:

That plaintiff is entitled to the additional invested capital for the years 1918 and 1919 as alleged in its petition and as stipulated between the parties. Plaintiff within the statutory period filed a sufficient claim for refund for each of said years. The judgment of the court should have been in favor of the plaintiff.

III

That the Court erred in finding that under the stipulation and agreement of the parties as to the facts plaintiff was not entitled to recover from defendant the amount sued for in its petition.

Wherefore appellant prays that the judgment entered by the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri, be reversed.

Abraham Lowenhaupt, Spencer M. Thomas, Attorneys for Appellant.

Copy of above received this 22nd day December, 1931.

Claude M. Crooks, Asst. U. S. Atty.

[fol. 18] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL TO PLAINTIFF BEMIS BRO. BAG COMPANY—Filed Dec. 22, 1931

Now, on this day, comes the plaintiff Bemis Bro. Bag Company, a corporation, by its solicitors; come also, by its solicitors, the United States of America, defendant in this cause; and thereupon said plaintiff presented its Assignment of Errors; and upon consideration thereof said petition for appeal is allowed and the Court doth allow the said plaintiff an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the final judgment and decree rendered herein on the 23rd day of September, 1931, upon the filing of an appeal bond in the sum of Five Hundred Dollars ($500.00) conditioned according to law with good and sufficient security to be approved by the Court.

C. B. Faris, Judge.

IN UNITED STATES DISTRICT COURT

RECORD ENTRY SHOWING ISSUANCE OF CITATION AND FILING OF BILL OF EXCEPTIONS—December 22, 1931

Now, a citation is issued and filed, directed to defendant, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit within forty days from and after this date. And now comes plaintiff and presents its bill of exceptions, which said bill of exceptions is allowed, approved, signed, filed and ordered made a part of the record herein; thereupon plaintiff is granted ten days from this date within which to file its bond on appeal.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed Dec. 22, 1931

Be it remembered that upon the trial of this cause during the March Term, A. D. 1931, of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, on the 14th day of May, 1931,

before the Honorable Charles B. Faris, the following proceedings were had:

Appearances: Mr. Spencer M. Thomas and Mr. Abraham Lowenhaupt for Plaintiff and Mr. Frederick Dewart, Special Attorney, Bureau of Internal Revenue, and Claude M. [fol. 19] Crooks, Assistant United States Attorney, for Defendant.

And thereupon plaintiff to sustain the issues in its behalf, filed and offered in evidence the agreed statement of facts together with Exhibits A to N, both inclusive, which are in words and figures, as follows:

* * * * * * *

MEMORANDUM RE AGREED STATEMENT OF FACTS

The Agreed Statement of Facts appeared as a part of the Bill of Exceptions at this place in the original typewritten transcript, but is omitted from the printed record to avoid duplication. The Agreed Statement of Facts will be found at marginal page 10 of this printed record.

(Clerk here copy Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, and N, to said Agreed Statement of Facts.)

(CLERK'S MEMO.—Exhibits are inserted elsewhere in transcript.)

RECITAL AS TO BRIEFS

Thereupon said case was taken as submitted. Counsel for plaintiff is thereupon given thirty days within which to file a brief. Counsel for defendant is given thirty days thereafter to file its brief and twenty days thereafter for plaintiff to reply if it so desires.

And thereafter, to-wit, on September 23, 1931, the Court rendered judgment in favor of defendant, and filed at the same time a memorandum opinion giving the reason there-

for, which memorandum opinion is in words and figures as follows:

OPINION OF DISTRICT COURT

FARIS, J.:

This is an action brought by the plaintiff to recover from the defendant a certain sum of money alleged to have been overpaid on taxes. The Collector involved being out of office, the suit was brought directly against the United States of America.

The case was submitted on an agreed statement of facts, wherein the single question up for judgment was agreed to be whether plaintiff in its application for a refund (or ever before the statute of limitations ran) stated the facts or [fol. 20] grounds upon which it bottomed its right to a refund. Much controversy is waged over whether the facts or the grounds are to be stated. The statute relied on seems to use the word facts as the things which must be stated in such an application; while the courts (perhaps deeming the words, in a way, synonymous) rather uniformly use the word grounds, as the things which must be set up as a condition precedent to relief.

Plaintiff first specifically asked for a special assessment as the ground for a reduction of the taxes for the years of 1918 and 1919. This was finally refused. After the statute of limitations ran against plaintiff, it contended, and now contends, that the value of certain materials in its printing plant, long on hand and used by it, should have been added to capital, and which value when added would have reduced its taxes for the years 1918 and 1919 by something like twenty-three thousand dollars, for which, in this action, it prays judgment.

Plaintiff further contends that, even if the genus special assessment does not include the species addition to capital on account of printing material, yet, the Commissioner of Internal Revenue waived the point by an examination of the facts in 1926.

True it seems to be, that the Commissioner about the time stated reached the conclusion that had this printing material been added to invested capital it would so far have increased the latter as that the taxes exacted for 1918 and 1919 would have been decreased by the amount set out in the stipulation, namely, twenty-three thousand dollars.

Having reached this conclusion, however, the Commissioner then denied the claim on the ground that the statute of limitations had run prior to the time at which the present claim was made, as now made.

I take leave to doubt if any ordinary officer of the Government may waive the statute of limitations so as to render the Government liable (Finn vs. United States, 123 U. S. 227; Tucker vs. Alexander, 275 U. S. 228) or bring about by action or inaction a state of facts which would toll the statute of limitations. The case of Tucker vs. Alexander, supra, was a case wherein the waiver enforced by the Court, was made before the statute ran, not afterwards, as here. I think there was no waiver here. What in effect the Commissioner did was to ascertain how much plaintiff would be entitled to if it did sue. The information [fol. 21] has its use here in this action, at any rate.

The facts or grounds stated by plaintiff in its application for a refund, are that, "The excess profits tax and the war profits tax against this Company for the year 1918 should be assessed under the provisions of Sections 327 and 328 of the Revenue Act of 1918."

It is contended, however, that an examination and audit of plaintiff's books would have shown the fact of the existence of the printing materials, and thereupon, under the law, it would have been the duty of the Commissioner to add this item to invested capital. Obviously, the facts or grounds above recited give no hint of this present contention. Whether the statute means facts, as it says, or grounds, as the courts say, I think it clear that it means more than to say, as the contention of plaintiff in effect is, that "facts should be stated in such wise that other facts being deduced, or found on investigation, relief may be accorded." Especially would this seem so in the light of the fact that it has been said that "meticulous compliance by the taxpayer with the prescribed conditions must appear before he may recover" (Mass & Woldstein Company vs. United States, 283 U. S., 583; Lucas vs. Pilliard Lumber Company, 281 U. S., 249).

It would have been easy to say that the ground for relief was that invested capital should have been, but was not, increased by the addition of the value or worth of printing material on hand and owned.

I do not think the facts set out in the application fairly embrace the facts now relied on; hence, the judgment will be for the defendant, that it go hence and recover its costs.

To which action and judgment of the Court the plaintiff, by its counsel, duly excepts and continues to except.

And thereafter, to-wit, on September 28, 1931, the plaintiff filed its motion for new trial, which motion for new trial is in words and figures as follows:

MOTION FOR NEW TRIAL

Now comes the plaintiff in the above entitled cause and moves the Court to set aside its finding and judgment in the above entitled cause and to grant a new trial of the issues therein for the following reasons:

[fol. 22] 1. Because the finding and judgment of the Court are contrary to the evidence submitted in the cause.

2. Because under the stipulation and agreed statement of facts the finding and judgment of the Court should have been in favor of plaintiff and against the defendant.

3. Because under the law and the evidence submitted to the Court, plaintiff is entitled to recover.

4. The Court erred in returning judgment for the defendant on the Court's statement of the law in the case.

5. The Court found the facts contrary to the agreed statement of facts and misconceived the evidence in the case.

(Signed) Abraham Lowenhaupt, (Signed) Spencer M. Thomas, Attorneys for Plaintiff.

And thereafter, to-wit, on December 5, 1931, plaintiff's motion for new trial was by the Court overruled, and the Court filed at the same time a memorandum opinion giving the reason for overruling said motion for new trial, which memorandum opinion is in words and figures as follows:

OPINION ON OVERRULING OF MOTION FOR NEW TRIAL

Motion for new trial in this case will be overruled. On account of the insistence of counsel (of the sincerity of

which the Court is thoroughly convinced) and because counsel were so seriously insistent, I have given much time and trouble to a consideration of the motion for a rehearing.

The questions involved are very nice, close and difficult ones. There is, of course, as always, a chance that the Court was in error.

After many days' examination of all the authorities that counsel called my attention to, and what I was able to find by my own investigations, I have reached the conclusion that the motion ought to be overruled, which is accordingly ordered.

To which action of the Court in overruling its motion for new trial, the plaintiff, by its counsel, duly excepts and continues to except.

[fol. 23] IN UNITED STATES DISTRICT COURT

APPROVAL OF BILL OF EXCEPTIONS BY DISTRICT JUDGE AND COUNSEL FOR DEFENDANT

Forasmuch as said matters do not appear of record herein, the plaintiff has prepared and now presents this, its Bill of Exceptions, and prays that the same may be signed, sealed, and made a part of the record, which is accordingly done on this 22nd day of December, 1931.

C. B. Faris, Judge Eastern Division of the Eastern Judicial District of Missouri. (Seal.)

Approved by:
Claude M. Crooks, Assistant United States Attorney.

IN UNITED STATES DISTRICT COURT

RECORD ENTRY OF APPROVAL OF BOND ON APPEAL—December 26, 1931

Now comes the plaintiff and presents its bond on appeal in the sum of Five Hundred Dollars ($500.00) which said bond is approved and filed.

Bond on appeal for $500.00, approved and filed December 26, 1931, omitted in printing.

[fol. 24] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT ON APPEAL—Filed Jan. 9, 1932

To the Honorable James J. O'Connor, clerk:

You are hereby notified that the plaintiff in the above entitled cause, having prayed and been allowed an appeal to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, desires to file in said Court of Appeals a typewritten or manuscript transcript containing the following documents and proceedings in said cause, to-wit:

1. Petition—Omit the exhibits attached to the petition. They correspond to the following exhibits on the agreed statement of facts and appear in the bill of exceptions, to-wit:

Exhibit "A" is Exhibit "A" on the agreed statement of facts.

[fol. 25] Exhibit "B" is Exhibit "E" on the agreed statement of facts.

Exhibit "C" is Exhibit "F" on the agreed statement of facts.

Exhibit "D" is Exhibit "H" on the agreed statement of facts.

Exhibit "E" is Exhibit "B" on the agreed statement of facts.

2. Answer.

3. Bill of Exceptions.

Omit the following exhibits attached to the agreed statement of facts—Exhibit "C", Exhibit "D", Exhibit "G", Exhibit "L", Exhibit "M" and Exhibit "N". These exhibits are immaterial on this Appeal.

4. The Court's finding of facts and opinion, record entries of judgment, motion for new trial and order overruling same, order showing approval and filing of Bill of Exceptions.

5. Petition for Appeal.

6. Assignment of Errors.

7. Order granting appeal; order allowing time to file bond; bond, and order approving bond.

8. Citation and acceptance of service.

9. Præcipe for transcript and certificate of Clerk to transcript.

You are further notified that plaintiff elects to have transcript of the record printed under the supervision of the Clerk of said Court of Appeals, under its rules, and requests that you make and have filed in said Court of Appeals, said transcript herein requested, in accordance with the rules of said Court of Appeals.

Abraham Lowenhaupt, Spencer M. Thomas, Attorneys for Plaintiff.

Service of copy acknowledged this 9th day of January, 1932.

Claude M. Crooks, Attorney for Defendant.

[fol. 26] In United States District Court

Stipulation as to Exhibits and Portions Thereof to be Included in Transcript—Filed Jan. 18, 1932

It is stipulated by and between counsel for the plaintiff and counsel for the defendant in the above-entitled cause, as follows:

The statements hereinafter made concerning the contents of omitted exhibits or omitted parts thereof shall be taken in lieu of such exhibits or such parts thereof for the purpose of the record.

(1) Exhibits A, C, D, H, I and K to the Agreed Statement of Facts shall be copied in full as part of the transcript of the record in this case.

(2) Exhibit B to the Agreed Statement of Facts, being a copy of the claim for refund for the year 1919, need not be copied in full as part of the transcript of the record in this case. Only the following pages thereof, true copies of which are attached to this stipulation, need be copied into the transcript of the record, to-wit:

The first and second pages of said exhibit.

It is further stipulated that all the remaining pages of said exhibit are identical with the corresponding pages of the claim for refund for the year 1918, Exhibit A, and that the Exhibit A contained in the transcript of the record except the part corresponding to the two pages of Exhibit B to be copied above, shall be taken also as all the material part of Exhibit B.

(3) Exhibit E to the Agreed Statement of Facts need not be copied in full as part of the transcript of the record in this case. Only the following pages thereof, true copies of which are attached to this stipulation, need be copied into the transcript of the record, to-wit: The first, second and third pages thereof, and that part of the fourth page thereof preceding the subdivision "(C) Inventory Adjustment for 1917", also the signature at the end of the letter, and the affidavit.

(4) Exhibit F to the Agreed Statement of Facts need not be copied in full as a part of the transcript of the record in this case. Only the following pages thereof, true copies of which are attached to this stipulation, need be copied into the transcript of the record, to-wit: The first, second, third, fourth, fifth, and that part of the sixth page [fols. 27 & 28] thereof preceding the subdivision beginning "(3) Texas Bag & Fibre Company Purchase", also the signature at the end of the letter and the affidavit.

(5) Exhibit G to the Agreed Statement of Facts need not be copied as a part of the transcript of the record in this case. It is a letter from the Internal Revenue Agent in Charge at St. Louis, Missouri, transmitting his report to the Commissioner of Internal Revenue and is not material to this appeal.

(6) Exhibit L to the Agreed Statement of Facts need not be copied as a part of the transcript of the record in this case. It is a copy of plaintiff's tentative income and excess profits tax return for the year 1918 and is not material to this appeal.

(7) Exhibit M to the Agreed Statement of Facts need not be copied as a part of the transcript of the record in

this case. It is a copy of plaintiff's final income and excess profits tax return for the year 1918 and is not material to this appeal.

(8) Exhibit N to the Agreed Statement of Facts need not be copied as a part of the transcript of the record in this case. It is a copy of plaintiff's final income and excess profits tax return for the year 1919 and is not material to this appeal.

Spencer M. Thomas, Abraham Lowenhaupt, Attorney for Plaintiff. Louis H. Breuer, Claude M. Crooks, Asst. United States District Attorney.

[fols. 29 & 30]

EXHIBIT "A"

(Execute Separate Form for Each Tax Period)

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U. S.
January 18, 1922

Important
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Claim For

..... Abatement of Tax Assessed

..... Credit Against Outstanding Assessments

....X ... Refund of Taxes Illegally Collected

..... Refund of Amounts Paid for Stamps Used in Error or Excess

Collector's Notation

District

Account number

Date received

State of Missouri }
City of St. Louis } ss:

Notice To Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit

Stamp here

Stamp here

.....
Collector of Internal Revenue

Type or Print

Bemis Bro. Bag Company
(Name of taxpayer or purchaser of stamps.)
601 South Fourth Street
(Residence—give street and number as well as city or town and State.)
St. Louis, Missouri
(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

	Period			Year
1. Business in which engaged	From:	Jan.	1	1918
2. Character of assessment or tax	To:	Dec.	31	1918
(State for or upon what the tax was assessed or the stamps affixed.)				
3. Amount of assessment or stamps purchased				$6.046.728.28
4. Reduction of Tax Liability requested (Income and Profits Tax)				$1.270.907.97
5. Amount to be abated				$
6. Amount to be refunded (or such greater amount as is legally refundable)				$1.270.907.97
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) Mar. 15; Jun 15; Sept. 15 and Dec. 15, 1919.				
(If statement covers income tax liability, items 8–11, inclusive, Must be answered.)				
8. District in which return (if any) was filed 1st District Missouri				
9. District in which unpaid assessment appears None				
10. Amount of overpayment claimed as credit				$ None
11. Unpaid assessment against which credit is asked; period from to				$ None

Deponent verily believes that this application should be allowed for the following reasons:

.....

.....

[fol. 31] (Attach additional sheets if necessary.)

(Signed) Bemis Bro. Bag Company, J. S. Bemis, Vice-President.

Sworn to and subscribed before me this 12th day of January, 1924. My commission expires Nov. 15, 1927. C. F. Wassall, (Title:) Notary Public.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

The Excess Profits Tax and War Profits Tax against this company for the year 1918 should be assessed under the provisions of Section 327 and 328 of the Revenue Act of 1918.

The facts and argument in support of this claim are contained in a brief, duly verified, which has been filed with the Commissioner of Internal Revenue, in support of a claim for refund made in connection with the company's return for 1917 and the tax paid thereon. The facts and circumstances which entitle the company to assessment under said sections for 1917 obtained also in 1918. In order to simplify matters and avoid repetition, the brief filed with the claim for refund for 1917 (a copy of which brief is attached hereto) by reference thereto is made a part of this claim.

Estimating, from such advice as is available, that the tax of representative corporations was equal to 40% of their net income for the year 1918, the company has calculated its tax liability for said year, as follows:

Net income, as per amended return			$10,153,439.00	
Tax paid, as per amended return				$6,046,728.28
Estimated Tax Liability:				
Excess Profits & War Profits Taxes of representative concerns estimated at 40%			4,061,375.60	
Net income		10,153,439.00		
[fol. 32]				
Less:				
Interest on obligations of U. S.	46,737.32			
Profits:				
Taxes	4,061,375.60			
Exemption	2,000.00			
		4,110,112.92		
		6,043,326.08		
Tax at 12%			725,199.13	
			4,786,574.73	
Less income, war and excess profits taxes paid other countries			10,754.42	
				4,775,820.31
Amount to be refunded				1,270,907.97

In re Claim of Bemis Bro. Bag Company for Refund of Taxes for the Year 1917 Based Upon Right to Special Assessment

To the Honorable Commissioner of Internal Revenue, Washington, D. C.:

Bemis Bro. Bag Company has heretofore filed its claim for refund of taxes for the year 1917, based upon the right to assessment of its Excess Profits Taxes under Section 210 of the Revenue Act of 1917. It now desires to elaborate and present in detail the reasons why its Excess Profits Tax for said year should be so determined.

The subdivisions of the statement hereafter written are as follows

Outline

I. Reasons why the tax should be so determined and facts upon which such reasons are based:

(1) The Commissioner is unable to determine the invested capital as provided in Section 207 of the Revenue Act of 1917. Due to conservative accounting and mistaken analysis, the plant and machinery accounts do not disclose the cost or value of these items, in support of which statement we shall refer to a few items disclosed by the books concerning

[fol. 33] A. Plant Accounts—

(a) St. Louis Bag Factory.

(b) Bemis, Tennessee, Plant.

B. Brand Printing Plates and Equipment.

(2) A mixed aggregate of tangible and intangible property has been paid in for stock, and the Commissioner is unable to satisfactorily determine the respective values of the several classes of property at time of payment.

(3) The tax, if determined without benefit of Section 210, owing to abnormal conditions affecting the capital and income, would work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of Section 210 and the tax computed by reference to the representative corporations referred to in Section 210.

(a) The very considerable and valuable good-will of the Company has never been capitalized and no invested capital is allowed to the Company because thereof.

(b) A considerable part of the Company's business was done upon borrowed capital.

(c) Salaries paid to officers and employees holding stock were insufficient for the services rendered.

(d) Inventions and patents possessed by the Company, given to the Company, or paid for by the Company prior to 1917, are allowed no value as invested capital.

(e) The net income of the taxable year was in large part the realization in that year of the earnings of funds expended during previous years, but not capitalized. The net income of the taxable years was also largely due to the results of the activities of the preceding years.

(f) Conclusion.

II. The company's business.

III. Invested capital and income of preceding years.

IV. Profits from Government contracts.

V. Relief sought.

[fol. 34] Statement

The facts are hereafter stated in the order and under the subdivisions above written.

I. Reasons Why the Tax Should Be So Determined and the Facts Upon Which Such Reasons Are Based

(1) Invested capital cannot be determined as provided in Section 207.

A—Plant Accounts

The Company was incorporated on May 8, 1885. It now operates branches in the following cities:

Boston, Mass.—Purchasing Department and Sales Organization.

St. Louis, Mo.—Bag Factory, Cotton Mill.

Bemis, Tenn.—Cotton Mill, General Store.

Brooklyn, N. Y.—Bag Factory.

Houston, Tex.—Bag Factory.
Indianapolis, Ind.—Bag Factory, Bleachery, Cotton Mill, Machine Shop, Ink Factory.
Kansas City, Mo.—Bag Factory.
Memphis, Tenn.—Bag Factory.
Minneapolis, Minn.—Bag Factory.
New Orleans, La.—Bag Factory.
Omaha, Neb.—Bag Factory.
Peoria, Ill.—Paper Bag Factory, Paper Mill.
San Francisco, Cal.—Bag Factory.
Seattle, Wash.—Bag Factory.
Winnipeg, Canada—Bag Factory.

Some of the plants above listed or parts of them were owned prior to the formation of the Company. Others were operated in other localities and have been moved or reconstructed since the Company was formed. The number of branches has grown through the years since the organization of the Company.

In the early years no settled or clear line of demarcation between repairs and maintenance on the one hand and renewals or capital additions on the other hand was made; [fol. 35] the tendency of the officers of the company was at all times to be very conservative. Considerable expenditures in the nature of improvements and betterments were made, which should have been capitalized, but which were charged to current expense. This is evident from a comparison of the plans and the plant accounts.

The vouchers of those years are no longer in existence and the exact determination of amounts and items is impossible. But some items of considerable amount appear upon the ledgers and demonstrate the foregoing statement to be true.

The items that we have discovered are such as might properly have been capitalized, but the entries made which would have resulted in their capitalization were afterwards reversed by the officers of the Company. The first entries made representing some such expenditures were afterwards reversed and charged off. As illustrations, we mention the following items discovered upon a cursory examination of the accounts of two plants. In this examination it was impossible to determine anything before the year 1901 and all of the entries of this character that we have discovered were made prior to 1913.

The accounts to which we directed or attention for the purpose of illustrating the manner of accounting were those of the St. Louis Bag Factory and the Bemis, Tennessee, Cotton Mills branches. We selected these as representative of the various endeavors of the Company. A considerable part of the printing equipment has never been capitalized, and it also offers a striking example of the Company's conservative accounting methods.

(a) St. Louis Bag Factory

Item 1. In 1907 an account was opened called "St. Louis Factory Building Account." The items charged to it consist of sand and gravel, hardware, purchases from a Rope and Cable Company and various items of this character. On November 30, 1907, the original decision to capitalize these items was reversed. The total then charged to this account—$2,555.53—was charged to profit and loss. Thereafter no such account appears upon the books and further items of this character on construction then under way were all charged to expense.

Item 2. On November 30, 1909, the following entry appears on the journal:

[fol. 36] Profit and Loss, Dr	$254,263.58
Real Estate and Buildings, Reserve, Cr	219,853.58
Machinery and Fixture, Reserve, Cr	34,410.00

The effect of this entry was to reduce the fixed assets account $254,263.58.

(b) Bemis, Tennessee, Cotton Mills

Item 1. In April, 1900, the Jackson Fibre Co. was incorporated under the laws of Tennessee, by some of the principal stockholders of Bemis Bro. Bag Co. The stock stoood in the name of the officers of the Bemis Bro. Bag Co. The land upon which the plant and village are built was given to the Company by Madison County, Tennessee. The community is made up entirely of the Company's employees and their dependents. Mr. J. M. Bemis was much interested in the development and welfare of the community, and from time to time made substantial gifts from his personal funds, particularly in the Church, Schools and Y. M. C. A. building and furnishings, amounting to $24,942.42, was a gift from

Mr. J. M. Bemis, and one-half was paid by the Company and charged to "expense".

Item 2. An account called "General Expense of Construction" was charged to "profit and loss". It was originally planned to capitalize it, but on November 30, 1901, $16,997.42 was charged off to reduce the permanent investment to $710,000. On January 15, 1902, "Profit and Loss" was debited and "Expense of Construction" was credited with $16,601.92, and in February, 1902, this account was closed out to "Profit and Loss."

Item 3. An account called "Starting Expense" was maintained through May, June and July of 1901 and was then charged to Profit and Loss, and thereafter all the "Starting Expense" was charged to Profit and Loss.

The instances cited above are demonstrative of the accounting principles applied throughout all the plants. It was the custom of the Company to capitalize only the direct cost of labor and materials, and thereafter, costs of additions and betterments were usually considered "expense". The aggregate of such items considering all the plants is a very serious total.

[fol. 37] B—Brand Printing Plates

An outstanding instance of the conservative methods applied by the Company in the construction and maintenance of its accounts was discovered in its equipment. The Company makes bags upon which it prints the user's brands, and it is reputed to have in its printing press equipment, a larger daily impression capacity than the largest newspaper in the United States, not excepting any one of the New York or Chicago daily papers.

The brands are printed upon the bags with metal printing plates. To make this plate it is necessary first to make a drawing or photograph of the brand, from which a metal pattern is made. A matrix is then made from the pattern and the printing plate is made from the matrix. The printing plate in time wears out, whereupon it is melted down and a new one made from the matrix, or if the matrix has become mutilated, a new matrix is made from the pattern. (If the brand is printed in several colors, it will require several plates to print a brand. A set consists of the copy,

the pattern or patterns, matrix or matrices and the printing plates or plate necessary to print the brand.)

Each element of a set is indexed. The copies are filed in filing cabinets, the matrices are filed in large metal cases; the patterns and printing plates are kept in fireproof vaults.

This equipment is the most necessary part of the Company's business. Its buildings and other equipment could be easily duplicated, but if its printing sets were destroyed it would require years to duplicate them and the Company in the meanwhile would have to abandon substantially all of its business. These plates have been acquired through the years of the Company's business and at an enormous cost of endeavor, labor and money, all of which has been charged to expense. (They are the [concret-] embodiment of the Company's business career.)

The engineers of the Company, from the records of the Company, have prepared a calculation showing the amount which it would have cost in 1916 to produce the printing plate equipment possessed by the Company. This calculation is based on the plates possessed on December 31, 1922, because the Company's records in 1916 did not show the date of the last use of any plate. Due allowance has been made, however, for the normal growth of the number of the plates since 1916. The value of the plates possessed on December 31, 1916, so calculated, is $851,375.50.

[fol. 38] This calculation has been prepared upon the most conservative basis. The average costs used for the various items, copies, engraved plates, matrices and printing plates were determined by the engineers from the exact calculations of the minimum time and material required for the making of the average copy, engraved plate, matrix and printing plate. An exact calculation of the cost of 200 sets taken at random showed a much larger average cost. This calculation was made to check the engineer's estimates. The lower cost calculated by the engineers was used and the cost so determined was reduced to 1916 cost.

Exhibit I, attached hereto, sets forth the details of this calculation based upon the engineers' calculations of cost and value of the average unit. Exhibit II. is the exact cost of 200 sets taken as they stand in the files, without discrimination, which shows a much higher average cost and proves that the engineers' calculation is conservative.

The calculation of bare labor and material value does not disclose the real cost or value of this asset. This asset also represents all of the solicitation and advertising expense, the advantage and value of possession and the good-will accumulation of years. By possessing the plates, etc., for printing with dispatch the brands of its customers, the Company is able to give an unexcelled service to the trade, and it is thereby largely assured of a continuation of patronage.

(2) A Mixed Aggregate of Tangible and Intangible Property Has Been Paid in for Stock and the Commissioner is Unable to Satisfactorily Determine the Respective Values of the Several Classes of Property at the Time of Payment.

A. Original Incorporation.—The Company was incorporated on May 8, 1885, with an authorized capital stock of $350,000 and took over a going business theretofore operated by Judson M. Bemis and Stephen A. Bemis, a partnership under the firm name of Bemis Bro. & Company. This business was originally established by Judson M. Bemis in the year 1858, and the partnership with Stephen A. Bemis was formed in about the year 1867.

At the date of the incorporation of the Company a very profitable business had already been developed, the annual sales approximating $1,500,000. A bag factory and cotton mill were operated in St. Louis and branches were maintained at Boston and Minneapolis. No balance sheet as of the date of incorporation is now available, but on November [fol. 39] 30, 1885, six months after the incorporation, the financial position as set out in a statement prepared at that time was as follows:

Balance Sheet as at November 30, 1885

Assets

Cash	$14,550.13	
Merchandise Inventory	171,365.41	
Bills Receivable	8,231.72	
Accounts Receivable	147,011.60	
B. B. B. Co. Minneapolis	112,900.92	
Due from Stockholders	19,408.86	
Doubtful accounts	596.74	$474,065.28
Real Estate and Buildings	$47,500.00	
Fixtures Account	65,000.00	
Stable Account	3,217.72	
Total Fixed Assets		115,717.72
Total Assets		$589,783.10

Liabilities

Bills Payable	$93,339.30	
Accounts Payable	27,434.88	
B. B. B. Company, Boston	67,523.14	
Home Cotton Mill	12,035.66	
Due Stockholders	2,071.37	
		202,404.35
Capital stock		350,000.00
Profit		37,378.75
Total Liabilities		$589,783.10

*NOTE.—On December 15, 1885, the Profit and Loss Account was credited $23,022.11 as Profit of B. B. B. Company, Minneapolis, and after some further adjustments the Profit and Loss Account to November 30, 1885 is shown as $57,025.69.

We attach hereto (Exhibit III) a copy of the minutes of the first stockholders' meeting held in St. Louis, Missouri, on June 8, 1885. From these minutes it will be seen that all the property of the partnership was transferred, including the good-will, and that the sole consideration consisted of $350,000.00 in capital stock of the new company.

At the date of incorporation the co-partnership had already esablished a splendid reputation and had developed a very valuable good-will. The direct cost of the establishment of this good-will is impossible at this to determine, as the expenditures were in a large measure indirect. The [fol. 40] partners were young men when they started the business, and applied themselves closely and continuously to it, drawing only nominal wages or salaries.

No reliable record is now available of the earnings in the years prior to incorporation of the Company, but the following statement of the earnings immediately after the incorporation of the Company will afford some idea of the extent to which the business had been developed:

Year ending	Net earnings	Capital and surplus
Nov. 30, 1885 (6 months)	$57,025.69	$350,000.00
Nov. 30, 1886	65,513.60	407,000.00
Nov. 30, 1887	108,009.46	448,500.00
Nov. 30, 1888	234,358.94	549,000.00
Nov. 30, 1889	129,224.12	702,500.00
Average per annum	$118,826.36	$491,400.00

From the foregoing figures it will be seen that the average annual income amounted to 24% of the tangible assets employed and that, after setting aside 7% of the tangible

assets, there remained annual earnings of $84,426 applicable to the intangible values, thus indicating a good-will value of from $600,000 to $850,000. Such a valuation would not be unreasonable, as the business had already been in existence for a period of 27 years.

Upon the incorporation of the Company the assets transferred clearly covered all assets, both tangible and intangible, and it is so stated in the minutes of the stockholders. But no specific value was placed upon the intangible assets acquired. All the stock of the new company was issued to the partners and no outside capital was interested, so that the question of appropriate value for the good-will will not arise. Moreover, the stock continued to be closely held in the families of the incorporators and there was no reason at any time to place upon the books of the Company or in its balance sheet any valuation for the intangible assets.

If the value of the respective kinds of property could be satisfactorily determined this Company would be entitled to additional invested capital under the provisions of Article 57 of Regulations 44 and T. B. R. 49 and A. R. R. 307. But in this case the value of the good will acquired at the organization was in excess of the total capital stock then issued and no proper allocation of the value of the property paid in for capital stock can be made. As stated in A. R. R. [fol. 41] 307, that fact entitled this Company to assessment of its taxes under Section 210.

B. Subsequent Purchases.—Since the organization of the corporation various companies have been purchased by the Bemis Bro. Bag Company. No refinancing was attempted and no good-will value was set up on the books from time to time as different plants were purchased. Although these were going and money-making concerns, they were purchased and taken over at this book value, which did not include any value for their good-will. The stockholders of all the companies purchased, except the cotton mill, hereafter described as part of the purchase from Brower & Love Bros. Company, were the principal stockholders of Bemis Bro. Bag Co. and for that reason they were indifferent to the stated purchase price. The entire assets of such going concerns as were acquired through purchase were as follows:

(1) Gulf Bag Company, Ltd., with bag factories at New Orleans and San Francisco, was purchased by Bemis Bro.

Bag Company in 1900, at its book value; that is to say $193,400.

(2) Home Cotton Mills Company, with a cotton mill at St. Louis, Mo., was purchased by Bemis Bro. Bag Company in 1902, at its book value; that is to say $250,000.

(3) Jackson Fibre Company, with a cotton mill and modern cotton mill village at Bemis, Tenn., was purchased by Bemis Bro. Bag Company in 1910, at its book value; that is to say $710,000.

(4) Brower & Love Bros. Company, with a cotton mill and bleachery at Indianapolis, Ind., was purchased by Bemis Bro. Bag Company in 1911, at its book value; that is to say $500,000.

(5) Texas Bag & Fibre Company, with a bag factory at Houston Texas was purchased by Bemis Bro. Bag Company in 1917, for $500,000 which was $56,659.92 less than its book value.

Upon any proper account of the purchases, mergers and consolidations above stated, value and cost should be assigned to the good-will of the companies acquired. The absence of detailed records of these companies at this date makes the exact calculation of good-will value almost impossible. But the dividend records of those companies indicate that their good-will was worth practically as much as their physical assets.

[fol. 42] (3) The Taxes, if Determined Without the Benefit of Section 210, Owing to Abnormal Conditions Affecting the Capital and Income of the Corporation, Would Work Upon the Corporation Exceptional Hardship Evidenced by Gross Disproportion Between the Taxes Computed Without the Benefit of Section 210 and the Taxes Computed by Reference to the Representative Corporations Referred to in Section 210.

As previously stated, the stock of the Company has largely been held by the officers of the Company and their immediate families. This fact has resulted in such arrangements of the capital of the Company and such disregard as to whether the profits were received as dividends, or as payments for items which would constitute Company ex-

pense, that the invested capital upon the statutory basis is abnormally low and the statutory income subject to tax is abnormally high. As substantiation of this statement we point to the following particular facts.

(a) Good Will.—There has never been any reorganization of this Company. In the years prior to 1917 the Company developed a very large and substantial good-will. We have heretofore stated the invested capital and net profits of the Company for the years just succeeding its organization. We are hereafter stating invested capital and the profits of the Company for the years 1902 up to and including the year 1916. In the whole life of the Company there was never a year in which it suffered a loss except the years 1914 and 1920, the reason for which is hereafter stated. The figures show the substantial good-will value possessed by the Company.

We venture that not another organization in the United States in the year 1917 had made so substantial a showing of good-will value through so many successive years without reorganization and without the capitalization of its intangible assets, in consequence of which it is deprived of the benefits of this factor in its Invested Capital figures for federal tax purposes.

The good-will possessed by the Company was established at enormous expense. The making of bags for any user involves a very substantial preparation. After the business is secured and his bag designs have been arranged and submitted, plates must be made of his brand or trade-mark. Thereafter the possession of this data and the information is a great advantage in securing future business. The Company possessing the design of his bag, the knowledge and [fol. 43] record of the exact capacity and size, the color designs and plates for printing, can, with this knowledge and use of the records produce the finished bag for him upon very short notice; whereas, any other person would have to prepare all of this anticipatory work and would require a great deal of time. The Company frequently submits designs, estimates and samples upon which it may not secure any business at the time, but which business it may secure at some later date.

Practically all of the Company's customers served in the year 1917 were secured prior to that year, and all of the

expenses of preparation was incurred and charged to the profits of the year preceding.

Branches have been established in order to give better service and to secure economy and efficiency of operations. At various times the Company has made surveys of localities with the view to establishing of branches. Such surveys always involve considerable expense. Sometimes a plant has been located; at other times no satisfactory location has been found. On several occasions plants located in some locality have been found not advantageous and have been abandoned.

The list of locations of the Company's branches has been heretofore stated. It will be noted that branches are located throughout the United States, so that service may be rendered quickly and promptly and at the smallest expense in every part of the United States. Among them are listed the plants where the Company manufactures a large part of its raw material.

The branch at Bemis, Tennessee, and the Home Cotton Mills at St. Louis and the branch at Indianapolis manufacture a large part of the cotton goods used by the Company in making bags. The Company has a machine shop in Indianapolis at which it manufactures a large part of its machinery used in its various factories, and it operates a paper mill at Peoria, Illinois, which produces a large part of the paper used in its product. A considerable part of the sewing thread used in the making of bags, as well as the ink used for printing bags, is manufactured by the Company. In addition, the Angus Company, Ltd., of Calcutta, India, is largely owned by the officers of this Company. The Angus Company operates jute mills in India and exports its product to the United States.

No branch has been established without a most scientific and exhaustive examination into the location and into the [fol. 44] fitness of the location. The location of a plant by this Company is a matter of very serious and careful survey and examination by the officers and engineers of the company. The staff for the management must be secured and frequently carried upon the payroll prior to the operation of a new branch. The expense of surveying locations, determination of railroad outlets, transportation costs and service, labor conditions, together with cost of organizing

the force for the operation of all of the plants of the Company is an uncalculable aggregate amount.

When a new factory, such as a cotton mill, a bag factory, a paper mill, etc., is to be located and started, the expense of investigation with regard to the location, the expense of securing the necessary experienced managers, superintendents, and factory employees, the cost of unavoidable errors in judgment in employing persons unsuited to the work during the early months of operation, of necessity amounts to a very considerable sum in the case of each plant or factory located. All of the expenditures made on account of the above named conditions have been in all cases charged to expense; no such items of expenditure have been capitalized.

These are the elements incident to establishing a going business, growing from the mere manufacture of bags—that is, the sewing of bags—in one location, into the manufacture of bags in fifteen different locations throughout the United States and in Canada, including the manufacture of cotton goods and burlap and machinery and thread and ink.

All of this preparative expense was taken out of the profits of the years prior to 1917, so that by 1917 this great organization was ready. Only one new plant has been established since 1917, to-wit, the plant at Brooklyn, New York, opened in 1920.

As stated above, the stock of the Angus Company, Ltd., of Calcutta, was largely owned by the stockholders of this Company. Its prime purpose is to supply burlap cloth to this Company. By reason of that fact it has sought no other trade or custom, and by reason of that fact in the year 1917 it held to the performance of contracts with this Company in many instances at prices less than the prevailing market prices of such goods at the time of the delivery. The possession of this source of supply enabled the company to operate continuously during all the war years, because it had a reliable source of supply.

[fol. 45] As of January 1, 1917, the Company had had a corporate existence of 32 years and the business had been established for a period of 60 years. During the whole of this period there was at no time any reorganization of refinancing, in any form, except the incorporation of the Company in 1885. At no time during this entire period of 60 years was any valuation placed in the Company's records

to cover these valuable intangible assets and therefore, under the strict interpretation of the Revenue Act, the Company is not permitted to take into its invested capital any values whatever for such good will.

The Company's business is the manufacture of cotton and jute bags, and, as previously stated, it operates 20 branches, situated at various points throughout the United States and in Canada. The name of the Company is of national repute and its trade-mark, "The Cat in the Bag," is known in all industries where bags are used. Its business reached in the year 1917 sales of over fifty-seven million dollars and a large portion of this tremendous business was due to the momentum accumulated during the long period of the Company's history.

The total sales and statutory invested capital for the various tax years are as follows:

Year	Sales	Statutory invested capital	Turnover of capital per annum
1917	$57,248,000	$16,546,426	3.5 times
1918	94,993,000	21,863,524	4.4 times
1919	74,389,000	25,644,428	2.9 times

From the foregoing statement it will be noted that the Company's total capital (plant equipment, printing and all other assests) is turned over on an average of 3.6 times per annum.

This result is more apparent than real for the reason, as previously stated, that so much of the Company's capital is not disclosed. As further illustrating the disproportion between the business of the Company and its statutory invested capital, we set out the following figures of sales, expenses and income:

		Net Taxable Profits		Percent of profits to statutory invested capital
Year	Net sales	Amount	% to sales	
1917	$57,248,000	$9,724,880	17.0%	58.1%
1918	94,993,000	10,153,430	10.6	46.4
1919	74,389,000	9,593,765	12.9	37.4

[fol. 46] (b) Borrowed Money—The Company's statutory invested capital for the year 1917 was $16,546,426.00. The average borrowed capital for that year was $10,244,000.00. Included in the borrowings is an average indebtedness to stockholders amounting to $1,700,000.00. The indebtedness to stockholders at the close of the various years was as follows:

As of December 31, 1916	$2,082,342.83
As of December 31, 1917	1,697,902.57
As of December 31, 1918	1,587,571.07
As of December 31, 1919	1,407,352.20

While such balances bore interest at a nominal rate of 5% and *the* therefore properly regarded as money borrowed, and as such not to be taken into invested capital, the circumstances surrounding these particular items are such as to make them in effect paid-in surplus.

The relative invested capital and total borrowed capital for various tax years was as follows:

Year	Statutory invested capital	Borrowed capital
1917	$16,546,426	$10,244,000
1918	21,863,524	12,530,000
1919	25,644,428	3,618,000

The stockholders and officers not only loaned their personal funds to the Company upon which its operations were conducted, but they also arranged for its very large credit outside. The Company's credit prior to the year 1917 had so expanded and so grown that it was practically unlimited. Such great reliance could be placed upon its credit, maintained consistently by the integrity and responsibility of its officers, that it felt no necessity for a greater investment of funds in the stock of the Company.

(c) Salaries.—A substantial part of the stock of the Company is owned by the officers and members of their families, but various responsible employees are also substantial stockholders. The dividends paid by the Company upon such stock have always been large and the officers and employees have served the Company and looked to the return upon this stock for their compensation rather than to the salaries or wages paid to them.

The amounts of the salaries of officers and their relationship to the sales of the Company in the various tax years is as follows:

[fol. 47] Year	Total sales	Salaries paid officers	Percentage of salaries to sales
1917	57,248,000	81,225	4.14%
1918	94,993,000	110,520	0.11%
1919	74,389,000	157,520	0.21%

It will be noted that on an average during these three years the total salaries paid to officers aggregate only one-seventh of 1% of the sales. Wages paid to other employees who were substantial stockholders were relatively as insufficient to the value of their services.

(d) Patents and Inventions.—In the years of its operation, those connected with the Company have from time to time made various inventions, which the Company was using in the taxable year 1917, and which were the source of a considerable part of its saving. Such inventions made by those connected with the Company were given to the Company in the years preceding 1917, and such amounts as were paid to employees were charged to the expense of those years. Their use is thoroughly and skillfully protected so that competitors may not acquire them. As outstanding instances we mention the following:

(1) High-speed Hemming Machines.—Certain of the customers of the Bemis Bro. Bag Company require that a folded-over hem be placed around the mouths of the bags furnished them. The usual method of doing this work was to hem the bags on power sewing machines as a separate operation.

In 1913, the Bemis Bro. Bag Company developed a high-speed sewing machine in combination with guiding rolls, through the use of which it was possible to combine the operation of hemming with the operation of web printing described elsewhere.

The outstanding feature of this hemming machine is the very great speed at which it functions. In order not to reduce the production of the printing press it must hem the cloth as rapidly as the printing press can print it. To do this, it functions at approximately twice the speed of sewing machines available to other concerns in the same line of business. This special sewing machanism has also enabled the Bemis Bro. Bag Company to realize a saving in the amount of sewing thread consumed in the hemming operation.

To illustrate the savings effected through the use of this machine, the following figures are submitted:

[fol. 48] Bags processed on machines of this type during the year 1922	17,078,000
Aggregate saving in labor cost through the use of this mechanism on the above bags	$22,426.00
Brought forward	$22,426.00
Aggregate saving in sewing thread through the use of these machines	3,098.00
Total	$25,524.00

The saving realized through the use of this invention would justify a value of at least $250,000.00. As a matter of fact only the cost of making the various physical mechanism now in use has been capitalized; even the expense of experimentation, drafting, and preliminary models and designs was charged off.

(2) Web Printing Device.—Many of the customers of the Bemis Bro. Bag Company specify that bags shall be printed on both sides. The usual method of doing this work is to feed the bags through the printing press twice, first printing one side, and then the other. This involves a double labor cost.

In the period between 1905 and 1909 the Bemis Bro. Bag Company developed a mechanism for taking the required amount of cloth for a bag from a roll, cutting it, printing both sides simultaneously and folding it ready to be sewed into a bag, all in one operation. This device has been in use for some years.

To illustrate the savings realized by the Bemis Bro. Bag Company through the use of these machines, the following figures are submitted:

Number of bags printed on both sides in one operation during the year 1922 by means of the B. B. B. Co.'s web printing attachment	37,708,000
Total saving in wages during the year 1922 through the use of this machine	33,241.00

The saving realized through the use of these machines indicate a value to this Company of at least $330,000.

(3) The foregoing are, we believe, sufficient illustrations of the valuable inventions and devices possessed by the

[fol. 49] Company. There are other devices and inventions of great value. The list and description of each one of them would extend this brief beyond the proper limits. The effect of all of them in this Company's business is so great that to a considerable extent they account for the apparent abnormality of its profits.

(e) The net income of the taxable year was in large part the realization in that year of the earnings of funds expended during the previous years but not capitalized. The net income of the taxable year was also largely due to the results of the activities of preceding years.

The facts supporting this subdivision are essentially those above stated. Summarized, they are as follows:

(1) A large part of the cost of construction, betterment and repair of plants and equipment and the total cost of its printing plates was charged to expense in the years prior to 1917.

(2) Uncapitalized good-will acquired for stock at the formation of the company, the good-will of these going and money-making concerns subsequently purchased, and the very large good-will and going business developed prior to 1917 through operations of the Company and through methods and procedures some of which were very expensive and all of the cost of which was charged to expense, are the source of much of the Company's business.

(3) The development through the years of a large and impressive array of clients and customers, whose custom was held by reason of prompt and efficient service of those years, and also by reason of the possibility of better and quicker service than any competitor could offer because of the possession of the plates for the printing of their brands upon their goods enabled the Company to secure a very large part of its business for the year 1917 at substantially no selling expense.

(4) The improvement of methods and the discovery of devices at large expense, by which not only was the product improved, but large savings were effected in manufacturing through speeding up the operations of machinery and the substitution of machines for hand work.

(5) The location arrangement, starting and development of branches throughout the United States, the development [fol. 50] of sources of supplies in the years prior to 1917 made the successful operations of that year possible.

(f) Conclusion.—All of the facts above stated under the subdivision entitled "Invested Capital cannot be determined as provided in Section 207," are partly responsible for the abnormally high profits shown by the Company. They result in insufficient depreciation deductions because the capital accounts are not properly disclosed whereby the income is made larger than the actual taxable income of the Company. These with the facts heretofore recited in this subdivision are some of the more important reasons which make the relations of income to invested Capital abnormal.

The abnormality of these things appears best in the results of the Company's operations. The abnormality is all internal and hidden and, just as the exact character and nature of a disease may be discovered by the external appearances, so in this case the external appearances are demonstrative of the existence of the facts above recited.

An examination of the plants will demonstrate to anyone that they were never built for the amount of charges to the accounts on the books. The very large showing of profits constantly coming from this business for so many years—profits which were earned when no abnormal conditions existed and when profits could only be earned in the ordinary operations of the business in normal competition with others—demonstrate that there was employed in this business capital in addition to that shown by the books. And the conservative disposition of the founders of this business with the opportunities offered by the exceedingly large profits of the Company for the indulgence of this conservatism shows just how from year to year from its beginning, capital expenditures were lost in expense until the aggregate of all of them is appalling and the application of this tax upon the statutory basis makes the result confiscatory.

II—The Company's Business

The Company operates cotton mills wherein it produces cotton goods to be used by it in its bag factories. It manu-

factures cotton and burlap bags. These bags are sewed, and in most cases, printed with the users' brands. It manufactures a large part of its machinery equipment, and it also manufactures most of the printing ink used, and a considerable part of the thread with which the bags are sewed.

[fol. 51] III—Capital and Income of Preceding Years

The invested capital so far as it is disclosed by the books and the net income of the Company for each year since 1901 has been as follows:

	Capital and surplus at beginning	Earnings
Nov. 29, 1902	3,410,618.00	532,588.00
Nov. 29, 1903	3,736,832.00	653,514.00
Nov. 29, 1904	4,280,208.00	657,642.00
Nov. 29, 1905	5,622,592.00	1,050,632.00
Nov. 29, 1906	7,028,604.00	2,008,769.00
Nov. 29, 1907	7,651,233.00	1,479,649.00
Nov. 29, 1908	7,967,130.00	978,427.00
Nov. 29, 1909	9,161,294.00	943,700.94
Dec. 31, 1910	10,126,821.00	1,319,214.00
Dec. 31, 1911	10,356,230.00	1,058,456.50
Dec. 31, 1912	12,742,605.00	3,224,069.38
Dec. 31, 1913	13,061,886.00	1,936,721.49
Dec. 31, 1914	11,727,033.00 loss	102,862.99
Dec. 31, 1915	14,430,695.00	4,165,186.29
Dec. 31, 1916	17,054,484.00	4,111,789.79

The loss of 1914 was in large part due to the abnormal decline of values in this year.

IV—Government Contract Profits

The Company had no gains, profits or other income received on a cost-plus basis from Government contracts. It had no such contracts.

V—Relief Sought

Relying upon the sufficiency of the facts above recited to entitle it to the assessment of its Excess Profits Tax liability under the provisions of Section 210 of the Revenue Act of 1917, Bemis Bro. Bag Company has heretofore presented a claim for refund for the year 1917. We present this statement to you now and ask that at your earliest convenience you grant us a conference in connection there-

with, that insofar as possible the facts above recited be fully developed.

Respectfully submitted.
Jamison & Thomas, Lowenhaupt & Waite, Attorneys for Bemis Bro. Bag Co.

[fol. 52] STATE OF MISSOURI,
City of St. Louis, ss:

Judson S. Bemis, being duly sworn, deposes and says that he is Vice-President of the Bemis Bro. Bag Company, in whose behalf the foregoing statement is submitted; that he is familiar with the contents thereof, and that the facts stated therein are, to the best of his knowledge and belief, true and correct.

Judson S. Bemis.

Sworn to and subscribed before me this 12th day of January, 1924. C. F. Wassall, Notary Public. (Seal.)

[fols. 53 & 54]

EXHIBIT "B"

Treasury Department
Internal Revenue Service
Form 843—Jan., 1922
Comptroller General U. S.
January 18, 1922

(Execute Separate Form for Each Tax Period)
Claim For

Collector's Notation

District

Account number

Date received

Important
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

..... Abatement of Tax Assessed

..... Credit Against Outstanding Assessments

....X. ... Refund of Taxes Illegally Collected

..... Refund of Amounts Paid for Stamps Used in Error or Excess

Date received by Administrative Unit

State of Missouri }
City of St. Louis } ss:

Notice To Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

Stamp here

Stamp here

.....
Collector of Internal Revenue

Type or Print

Bemis Bro. Bag Company
(Name of taxpayer or purchaser of stamps.)
601 South Fourth Street
(Residence—give street and number as well as city or town and State.)
St. Louis, Missouri
(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

		Period		Year
1. Business in which engaged	From:	Jan.	1	1919
2. Character of assessment or tax	To:	Dec.	31	1919
(State for or upon what the tax was assessed or the stamps affixed.)				
3. Amount of assessment or stamps purchased				$2,999,754.82
4. Reduction of Tax Liability requested (Income and Profits Tax)				$ 606,546.31
5. Amount to be abated				$ None
6. Amount to be refunded (or such greater amount as is legally refundable)				$ 606,546.31
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) Mar. 15, 1920, June 15, 1920, Sept. 15, 1920.				
(If statement covers income tax liability, items 8–11, inclusive, must be answered.)				
8. District in which return (if any) was filed				
9. District in which unpaid assessment appears None				
10. Amount of overpayment claimed as credit				$ None
11. Unpaid assessment against which credit is asked; period from ..... to				$ None

Deponent verily believes that this application should be allowed for the following reasons:

.....

.....

[fol. 55] (Attach additional sheets if necessary)

(Signed) Bemis Bro. Bag Company. Judson S. Bemis, Vice-President.

Sworn to and subscribed before me this 10th day of December, 1924. Commission expires March 26, 1928. R. C. Knaup, (Title:) Notary Public.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

The Excess Profits Tax and War Profits Tax against this company for the year 1919 should be assessed under the provisions of Section 327 and 328 of the Revenue Act of 1918.

The facts and argument in support of this claim are contained in a brief duly verified, which has been filed with the Commissioner of Internal Revenue in support of a claim for refund made in connection with the company's return for 1917 and the tax paid thereon. The facts and circumstances which entitle the company to assessment under said Sections for 1917 obtained also in 1919. In order to simplify matters and avoid repetition, the brief filed with the claim for refund for 1917 (a copy of which brief is attached hereto), by reference thereto, is made a part of this claim.

Estimating from such advice as is available, that the tax of representative corporations was equal to 18 per cent of their net income for the year 1919, the company has calculated its tax liability for said year as follows:

Net income as per amended return		9,593,765.26	
Tax paid as per amended return			2,999,754.82
Estimated Tax Liability:			
Excess Profits & War Profits Taxes of representative corporations, estimated at 18%		1,726,877.74	
Net income		9,593,765.26	
[fol. 56]			
Less:			
Interest on obligations of U. S.	49,284.17		
Profits Taxes	1,726,877.74		
Exemption	2,000.00	1,778,161.91	
	1,778,161.91	7,815,603.35	
Tax at 10 per cent		781,560.33	
		2,508,438.07	
Less income, war and excess profits taxes paid to foreign countries		115,229.56	
			2,393,208.51
Amount to be refunded			$606,546.31

Respectfully submitted.

Jamison & Thomas, Lowenhaupt & Waite, Attorneys for Bemis Bro. Bag. Co.

STATE OF MISSOURI,
City of St. Louis, ss:

Judson S. Bemis, being duly sworn, deposes and says that he is Vice-President of the Bemis Bro. Bag Company, in whose behalf the foregoing statement is submitted; that he is familiar with the contents thereof, and that the facts stated therein are, to the best of his knowledge and belief, true and correct.

Judson S. Bemis.

Sworn to and subscribed before me this 10th day of Dec., 1924. My commission expires Nov. 16, 1923. C. F. Wassall, Notary Public, within and for the City of St. Louis, Mo. (Seal.)

[fol. 57] EXHIBIT "C"

Treasury Department, Washington

IT:E:SM. RSW-B-28462-6

October 30, 1926.

Bemis Brother Bag Company, 601 South 4th Street, St. Louis, Missouri.

SIRS: Your claim for the refund of $606,546.31 income and profits tax for 1919 has been examined.

Your claim is based upon your application for assessment of your profits tax under the provisions of Section 328 of the Revenue Act of 1918.

You are advised that after careful consideration and review your application under the provisions of Section 327 of the Revenue Act of 1918 has been denied for the reason that the evidence presented fails to establish that your invested capital or net income is affected by abnormal conditions which would justify the Bureau in computing your tax under the provisions of Section 328 of the above-mentioned Act.

In accordance with the above conclusions your claim for refund will be rejected in full.

The Collector of Internal Revenue for your district will be officially notified of the rejection at the expiration of thirty days from the date of this letter.

A copy of this letter has been forwarded to your representative, Richard S. Doyle, 820 Investment Building, Washington, D. C.

Respectfully, (Sgd.) C. R. Nash, Assistant to the Commissioner.

[fol. 58] EXHIBIT "D"

Treasury Department, Washington

IT:E:SM. RSW-10196. A-14502-6

Nov. 27, 1926.

Bemis Brother Bag Company, St. Louis, Missouri.

SIRS: Reference is made to your income and profits tax returns for the calendar years 1917 and 1918.

After careful consideration and review, your application under the provisions of Section 210 and 327 of the Revenue Acts of 1917 and 1918 for assessment of your profits tax as prescribed in Sections 210 and 328 of the above-mentioned Acts has been denied inasmuch as the audit disclosed no exceptional hardship evidenced by gross disproportion between the tax computed by reference to representative concerns specified in Sections 210 and 328.

In accordance with the above conclusions, your claims for refund of $1,770,104.23 and $35,355.79 for 1917 and $1,270,907.97 for 1918 will be rejected in full.

The Collector of Internal Revenue for your district will be officially notified of the rejection.

A copy of this letter has been furnished your authorized representatives, Lowenhaupt & Waite, Suite 928-932 Planters Building, St. Louis, Missouri.

Respectfully, (Signed) C. R. Nash, Assistant to the Commissioner.

tcl-1.

EXHIBIT "E"

December Thirteenth, 1926.

Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR:

Reference: Bemis Bro. Bag Co., 601 S. Fourth Street, St. Louis, Missouri.
[fol. 59] Incorporated under the laws of the State of Missouri.
Your letters of October 30, 1926 and November 27, 1926.
Symbols: IT:E:SM-RSW-10196-A-14502-6; also B28462-6.
Years: 1917, 1918 and 1919.
Denial of claims for refund.

The Bemis Bro. Bag Company received the letters above described advising it that its claim for assessment of its excess profits taxes for the year- 1917, 1918 and 1919, under the provisions of Sections 210 and 327 of the Revenue Acts of 1917 and 1918 has been denied, "inasmuch as the audit (for 1917 and 1918) disclosed no exceptional hardship evidenced by gross disproportion between the tax computed by reference to representative corporations specified in sections 210 and 328" and as to 1919 for the assigned reason that the "evidence presented fails to establish that the Company's invested capital or net income is affected by abnormal conditions which would justify the Bureau in computing its tax under the provisions of Section 328". We protest against the rejection of said claims for refund for the following reasons:

(a) The excess profits tax against the Company for the year 1917 should be determined under Section 210 of the Revenue Act of 1917 and the excess profits and war profits taxes for the years 1918 and 1919 should be determined under section 328 of the Revenue Act of 1918. The denial of said right must be based upon the use of improper comparatives as representative.

(b) If the assessment of the excess profits taxes against the Company in the matter claimed in the above subdivision is denied, then the items heretofore presented which have been improperly eliminated from invested capital should be

restored to invested capital and the excess profits tax recalculated on that basis.

(c) Claim for refund of $35,355.79, taxes paid for the year 1917, should be allowed in part in any event.

Facts

(a) Special Assessment. We have heretofore presented the facts entitling the Company to assessment of its taxes in this manner. We believe that the facts presented are ample. They show the following: A mixed aggregate of tangible and intangible properties was acquired at the or- [fol. 60] ganization of the Company for its capital stock. No intangibles were set upon the books of the Company or appear in its invested capital and the Commissioner has not determined the relative values of the several kinds of property. There can be no doubt that a very valuable good will and very valuable trade-marks and trade names were acquired at the date of the organization of the Company.

Large capital expenditures in the many years of the life of the business have been charged to expense and do not appear in the invested capital of the Company and cannot now be fully restored.

We believe from your letter that the existence of the abnormalities is not denied and we construed your letter to mean that the comparatives do not show that the Company paid a tax so excessive as to require adjustment. The use of proper comparatives in the various years will not reach that result. We requested discrimination to eliminate the Companies whose names indicate they were in the bag business, which in the years in question were engaged in speculation in cotton goods and burlap. We have furnished a list of comparatives from which representative corporations might be chosen. The taxes paid by the Companies in this list disclose fully that the tax paid by Bemis Bro. Bag Company was excessive.

(b) Additions to Surplus Account. In the claim heretofore filed, we presented a list of capital items which had been charged to expense. This list did not purport to be exhaustive. If special assessment is denied, the items listed should be restored to invested capital and the Company's

surplus should be increased accordingly. These items are as follows:

St. Louis Factory Building, charge-off in 1907	$2,555.53
Home Cotton Mills Real Estate & Building account, charge-off Nov. 30, 1909	219,853.58
Home Cotton Mills, Machinery and Fixtures account, charge-off Nov. 30, 1909	34,410.00
Bemis, Tennessee plant, one-half Y. M. C. A., donated by J. M. Bemis, and one-half paid by the Company and charged to expense in 1900	49,884.84
Bemis, Tennessee plant, charge-off of construction cost in 1901	33,599.34
Printing equipment, charge to expense	851,375.50
Intangibles acquired at date of organization allocated on the basis of St. Louis Screw Company decision (2 B. T. A. 649)	227,500.00
Total	$1,419,178.79

[fol. 61] The list above written is self-explanatory, except as to several items.

The charge down of the real estate and buildings and machinery and fixtures at the Home Cotton Mills in 1909 was made under the following circumstances:

A reduction in some of the fixed assets at the Home Mills was made in 1909, because the director of the company felt that the cost of production of a mill in the City of St. Louis was out of line with the costs at Indianapolis and the Village of Bemis, Tennessee.

For a similar reason the plant investment at Bemis, Tennessee, was fixed at a maximum of $710,000.00 and all the costs in excess of that amount were charged off.

The printing equipment has been charged to expense. The value set out in the list above written, is the value at December 31, 1916. It is the minimum of the cost. The cost of the metal alone in the patterns and plates, together with the type, in this equipment at the minimum price per pound which has ever prevailed since the Company started to accumulate this equipment, was not less than $300,000. The metal in the patterns and plates is as good as new metal and can be used over and over again.

The allocation of capital stock issued at the date of the organization of the Company pursues the decision of the Board of Tax Appeals in the case of the St. Louis Screw Company, 2 B. T. A. 649. When the Company was formed in 1885, it issued $350,000.00 in par value of capital for all of the assets of the pre-existing co-partnership. The capital and income for the first four and one-half years of the Company's existence is set forth on page 13 of the printed memorandum filed with and attached to the claim for refund, disclosing that the Company acquired with its capital stock, good will and intangible assets worth not less than $650,000.00, as well as $350,000.00 of tangible property. Under the rule laid down by the Board of Tax Appeals in the above mentioned case, thirteen-twentieths of the capital stock was issued for the intangibles and seven-twentieths was issued for the tangibles. Thirteen-twentieths of $350,000.00 amounts to $227,500 which is the amount above claimed as an addition to the Company's surplus.

The addition claimed above should be allowed the Company. Surplus should be recomputed and the excess profits tax should be based upon its revised surplus, unless assess-
[fol. 62] ments of its taxes is allowed under the relief provisions of the statute.

Yours very truly, Lowenhaupt & Waite, Attorneys for Bemis Bro. Bag Company.

State of Missouri,
City of St. Louis, ss:

Judson S. Bemis, being duly sworn, on his oath says that he is President of the Bemis Bro. Bag Company, of St. Louis; that he has read the letter above written and knows the contents thereof and that the facts therein stated are true to the best of his knowledge, information and belief.

Judson S. Bemis.

Subscribed and sworn to before me this 14th day of December, A. D. 1926. My commission expires March 26, 1928. R. C. Knapp, Notary Public.

EXHIBIT "F"

April Twelfth, 1927.

Re Bemis Bro. Bag Company, Claims for Refund, Years 1917 to 1919, Inclusive

Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: This letter is written in response to your request made at conference in your office on February 23, for more detailed information on some of the facts presented to you. These facts were and are urged as elements of the right to special assessment and they are also urged as a basis for allowance of additional invested capital. We are unable to disclose and sustain the full invested capital to which the company is entitled by virtue of the facts hereinafter stated and heretofore presented to you. The invested capital to which we have made claim is the minimum invested capital to which the company is entitled.

We shall group the facts under the various items as follows:

[fol. 63] 1. Printing Equipment—Under this heading we have presented a claim for an allowance of invested capital on account of the patterns, plates, mats, copies and type, all of which has been charged to expense in the company's accounts. The cost of material in this equipment is only a small percentage of the costs. Labor is much the greater cost. The mats and copies are made of matrix paper which of course can only be used once, but the patterns and plates are made of metal which can be used indefinitely, and the type also has intrinsic value.

You have requested us to furnish you with the cost of the metal in the patterns and plates and the cost of type possessed on December 31, 1916.

We are enclosing tabulation made by the engineers of the Bemis Bro. Bag Company showing the calculation of the weight of the metal in patterns and plates and its minimum cost. The first sheet shows that in May, 1923, when the survey was made the weight of the patterns and plates then possessed by the company was 2,141,856 pounds. The records of the company disclose that the patterns and plates possessed in 1916 contained substantially the same amount of metal.

The next sheet shows the cost of the metal during the period that these patterns and plates were acquired by the company. Stereo-metal is made of lead 82%, antimony 13%, tin 5%. The metal company from which this metal is bought charged $1.00 per hundred pounds during this whole period for mixing the metal. The freight to the bag factories of the company upon the metal averaged 35 cents per hundred pounds. The freight was as high as 75 cents per hundred pounds to some factories. This schedule shows the average cost of stereo-metal was $8.93 per hundred pounds.

Sheets 3, 4 and 5 of the engineer's report are schedules of the high and low cost of lead, antimony and pig tin during the period from 1905 to 1916. The average prices upon the second sheet of the engineer's report are based upon the average prices set forth on the succeeding pages. In support of these average prices we are sending you a copy of "Metal Statistics" 1925. On pages 441 and 443 the prices on antimony used in this schedule are set forth. On pages 331 and 333 are the prices on tin. On page 365 are the prices on lead. We are submitting this book as a check upon the prices used.

We have used the average prices during all the applicable years on all of these items. Of course when business was [fol. 64] prosperous the prices of these metals were high and the need of metal in the company's business rose when business was prosperous so that it is more probable that more of the metal was purchased at high prices than low prices.

The schedule above mentioned discloses the weight of the patterns and plates at 2,141,856 pounds, which at the unit price of $8.93 per hundred pounds (the minimum cost of the metal alone in the patterns and plates) amounts to $191,267.74.

To this figure must be added the cost of type. In the brief presented to you on the 7th day of July, 1923, the cost of type used was 50% of the cost of type in December, 1922. By the count of pieces then possessed and the application of cost equal to 50% of December, 1922 cost, the total cost of all the type possessed by the company upon the count then made was $48,004.41, and the calculated depreciated cost of the type possessed December, 1916, was

not less than $46,342.47. This last figure is made by excluding the type at the Brooklyn plant.

This sum $46,342.47 added to the cost of the metal in the patterns and plates above stated $191,267.74, shows a total intrinsic value of $237,610.21.

The foregoing is without any allowance whatsoever for the labor cost of manufacturing patterns and plates and without any allowance for labor and material costs in manufacturing mats and copies which were also part of the company's printing equipment in December, 1916. The cost stated on our original claim, to-wit: $851,375.50, is very considerably less than the total cost of all the printing equipment possessed by the company in December, 1916, even after a very broad and ample allowance for any depreciation which this equipment had then suffered.

2. Good Will Acquired at Organization.—We have secured a copy of a book by William C. Edgar entitled "Judson Moss Bemis, Pioneer", published by the Bellman Co., Minneapolis, Minn., 1926. The history of the business is detailed in this book and it shows a business of very substantial size at the date of incorporation of the corporation. Material facts appearing in this book are as follows:

The business was organized in 1858 by Judson M. Bemis and Simeon Farwell (a cousin of Judson M. Bemis). Judson M. Bemis at the time had $2,000.00 and Simeon Farwell contributed the machinery for which he was to receive a [fol. 65] one-third interest. The total capital was about $3,000.00 (Pages 112 to 114).

The second year after the business was started Edward J. Brown, a second cousin of Farwell and Bemis, became a partner and several years later Bemis & Brown acquired Farwell's interest. They were thereafter equal partners (Pages 148-150).

Several years later Judson & Bemis together with J. G. Marriot began the manufacture of cotton bag goods under the name of Bemis, Marriot & Company. The name was later changed to Home Cotton Mills.

About two years after Mr. Brown was admitted to partnership the business so increased that larger accommodations for it became necessary and in 1861 they made an arrangement with Avery & Company of Boston to act as

their purchasing agents because they had outgrown in their requirements the limited local market for raw material (Pages 154 and 155).

About 1862 they bought the plant of J. H. Drew & Company (Page 155).

Sometime prior to 1864 they opened a Boston office and Brown took charge (Page 173).

About 1864 one Henry Digby was employed as manager of the St. Louis factory with a three year contract and an interest in the profits. Desiring to discharge him, the firm was compelled to pay him $25,000.00 for his interest in the profits (Page 188).

In June, 1867, Stephen A. Bemis (an older brother of Judson) entered the employ of Bemis & Brown. In 1870 he became a partner, the firm name then being Bemis, Brown & Company (Pages 223 and 224).

Early in 1873 just before the disastrous panic of that year Judson Bemis bought Brown's half interest in the firm for $300,000.00, $75,000.00 payable in cash and the remainder in notes payable at the rate of $8,000.00 per month. He borrowed $40,000 and apparently paid the purchase price out of the business. The business thereafter was called Bemis Bro. & Company (P. 229). A branch at Minneapolis was opened in 1882. (P. 252.)

[fol. 66] In 1885 the partnership bought the building on the corner of Fourth & Poplar, much larger quarters, and the factory was moved to that location. In the same year the corporation was organized to take over the bag business, Judson M. Bemis, President, being in charge of the Boston office. Stephen A. Bemis managed the bag factory. (Page 255).

In the same year, 1885, Judson Bemis made a trip to Dundee, Scotland, to make direct connections with burlap manufacturers of which product that was then the center (Page 255).

We have also located the ledgers employed by Judson M. Bemis after he purchased Brown's interest until the company was organized in 1885. These ledgers disclose that Stephen Bemis did not contribute any capital to the partnership. He had only an interest in the profits. The ledgers disclose that the entire business was owned by J. M. Bemis from 1873 until the corporation was organized. We have not prepared financial statements from the ledgers

but the credit to Judson M. Bemis on the ledger account includes such of his investments as were taken care of by the St. Louis office, that is, it includes investments outside of this business. For instance, it includes the cost of his home on Pine Street and various stocks and possibly some loans. The ledger shows net income and the total net worth of the partnership interests from 1879 to 1884, both inclusive, as follows:

	Net income	Net worth
Year ending Nov. 30, 1879	77,436.82	277,214.42
" " " " 1880	97,531.71	296,847.31
" " " " 1881	42,972.66	355,342.68
" " " " 1882	52,452.00	366,977.59
" " " " 1883	39,860.65	409,057.59
" " " " 1884	36,874.20	420,784.38
Totals	$347,128.04	$2,126,223.97
Average	$47,854.67	$354,370.66

It will be remembered from the history set forth above that J. M. Bemis purchased the interest of Brown, his partner, in 1873, paying $300,000.00. The statement above written discloses that the partnership capital at the end of 1874 was $231,682.87. The books also show that in 1874 the business made a profit of $43,688.35 which subtracted from the capital at the end of the year would indicate that after Brown was paid out, the total net tangibles of the business was $187,994.52. If Brown was paid entirely out of the [fol. 67] business of the co-partnership then the total assets of the co-partnership at the time the deal was made with him amounted to $487,994.52. Brown was paid upon the basis of a value of $600,000.00 which would indicate payment upon the basis of a good will value of $112,005.48.

The profits in the six years from 1879 to 1884, both inclusive, amounted to $347,728.04, or an average of $57,-854.67. The average tangibles in this period amounted to $354,370.66. Seven per cent on the average tangibles is $24,805.94 which subtracted from the average net income leaves a balance of $33,048.73 shown as the earnings on the intangible assets. This sum capitalized at 12½% would indicate a good will value of $264,889.84.

The years above enumerated include the panic years of 1883 and 1884, years in which the profits of the company were much below normal. In calculating the value of good

will at that date, the six years prior to incorporation and the five years subsequent to incorporation should be consolidated. This has been done in a number of cases before the Board of Tax Appeals. At the time the corporation was formed the panic of 1883 was on the wane and the profits of the subsequent years were apparent from the profits which had been earned prior to the panic of 1883 or the depression which began in 1881. We submitted the profits and net tangibles for the four and one-half years subsequent to the incorporation of the corporation in the original brief. They were as follows:

Year ending	Net earnings	Capital and surplus
Nov. 30, 1885 (6 months)	$57,025.69	$350,000.00
Nov. 30, 1886	65,513.60	407,000.00
Nov. 30, 1887	108,009.46	448,500.00
Nov. 30, 1888	234,358.94	549,000.00
Nov. 30, 1889	129,224.12	702,500.00
Totals	$594,131.81	$2,456,000.00

The average profits for the four and one-half years after incorporation (listed above) and for the six years preceding incorporation (heretofore listed) amounted to $89,643.80. The average net tangibles during the same period amounted to $416,656.77. A seven per cent return on the average net tangibles would equal $29,165.97, which would leave out of the average profits, above stated, $60,477.83. [fol. 68] This balance capitalized at 12½ per cent shows good will value equal to $483,722.64.

The profits after incorporation are a much fairer and more accurate indication of the value of the good will at the date of incorporation because the accounts were more accurately kept, and the profits prior to incorporation were seriously impaired by the panic of 1883, from which the business did not entirely recover until 1887, but finally because the capital prior to incorporation includes a number of outside investments made by Judson M. Bemis. In some of these outside investments he suffered losses and the returns were not large on any of them. Only the ledgers are in existence for this period and we are not able to segregate all of the investments outside of the bag business exactly or state all of the losses in these outside transactions. These outside ventures included in his capital account and the small income on some and the losses on others

reduce the showing of profits earned in the business. When the company was formed all of these investments were taken out leaving its net capital $350,000.00.

We have heretofore submitted the balance sheet at Nov. 30, 1885, showing total assets aggregating $589,783.10, and total liabilities, exclusive of capital stock and surplus, aggregating $202,404.35. In this statement Bemis Bro. Bag Company's account at Minneapolis is carried at the net figure of $112,900.92, which was the amount of the individual investment in that account at the date of the formation of the company. The balance sheet as of Nov. 30, 1885 was later modified by crediting to profit and loss $23,022.10, profits earned at the Minneapolis plant up to Nov. 30, 1885.

We are not able to tell from the ledgers in existence whether or not profits from the Minneapolis plant were carried into the accounts at St. Louis prior to incorporation. The branch was transferred to the corporation when it was formed, but it appears from the corporate books and accounts that in the beginning the company carried the branch accounts independently. The investment in the Minneapolis plant was carried by the corporation at a net figure.

Of course, if the profits of the Minneapolis plant and the Honie Cotton Mills were not taken into the accounts from which the figures prior to incorporation are taken, then the income and tangible investment are understated.

As appears from this balance sheet, the net tangible investment on May 8, 1885, was $350,000, so that for the $350,000 of its capital stock the company received net tan- [fol. 69] gibles aggregating $350,000 and intangibles which were worth as shown above the sum of $483,722.64.

Under the principles set forth by the Board of Tax Appeals in the Appeal of Mandle, 4 B. T. A. 341, (acquiesced in by the Commissioner) the capital stock issued should be allocated to the tangibles and intangibles in proportion to the respective value of each. Such allocation shows that, out of the total capital stock issued, $151,270.00 in par value was issued against the tangibles and $196,730.00 in par value was issued against the intangibles, resulting in a paid-in surplus of $196,730.00.

Yours very truly, Lowenhaupt & Waite, Attorneys for Bemis Bro. Bag Company.

STATE OF MISSOURI,
City of St. Louis, ss:

E. C. Earle, being duly sworn, on his oath, states that he is See'y & Asst. Treas. of the Bemis Bro. Bag Company; that he has read the foregoing letter and knows the contents thereof and that the facts contained therein are true and correct to the best of his knowledge, information and belief.

E. C. Earle.

Subscribed and sworn to before me this 21st day of April, 1927. My commission expires March 26, 1928. R. C. Knaup, Notary Public.

EXHIBIT "H"

Treasury Department, Washington

IT:FAR:AL. CAB

Dec. 17, 1927.

Bemis Brothers Bag Company, 601 South Fourth Street, St. Louis, Missouri.

SIRS: Your claims for the refunding of $1,805,460.02, income and profits taxes for 1917, $1,270,907.97, income and profits taxes for 1918 and $606,546.31, income and profits [fol. 70] taxes for 1919 have been reconsidered in connection with your protest, the conference held in this office and a reexamination of your books of account and records.

The claims for 1917 are based upon contentions for the restoration of items written off the books, adjustment to the 1917 income and consideration under section 210 of the Revenue Act of 1917, and the claims for 1918 and 1919 upon consideration under sections 327 and 328 of the Revenue Act of 1918, as indicated below.

(a) Amount charged off on the St. Louis Factory Building in 1907	$2,555.53
(b) Amount charged off the Home Cotton Mills, Land and Buildings in 1909	219,853.58

(c) Amount claimed to have been charged off on Home Cotton Mills, Machinery and Fixtures in 1909	34,410.00
(d) Amount written off the Bemis Tennessee plant in 1900	49,884.84
(e) Amount by which the Bemis Tennessee plant was written down in 1901	33,599.34
(f) Printing equipment alleged to have been charged to expense	851,375.50
(g) Amount of intangibles acquired at date of incorporation in 1885	227,500.00
(h) Paid-in surplus—Texas Bag & Fibre Co.	56,659.92
(i) Increase in inventory of goods acquired in the purchase of the plant of the Texas Bag and Fiber Company in 1917	19,840.73

After careful consideration of your contentions and the evidence at hand the following holdings have been determined.

(a) The nature of the items making up the $2,555.53, which you contend were charged off in 1907 and the fact that no evidence is available that distinguishes them from ordinary expense items precludes their restoration to the asset account.

(b) and (c) The amount $254,263.58 which you contend was charged off on the Home Cotton Mills, Land and Buildings and Machinery and Fixtures, was entered on your [fol. 71] books as a debit to Profit and Loss and credits to Real Estate and Building Reserve and to General Machinery and Fixture Reserve.

An examination of your balance sheets discloses that the only such reserve accounts are the depreciation reserves on those assets.

In the Revenue Agent's report of June 28, 1919, adjustment was made for excessive depreciation and $200,000.00 was restored to the Buildings Accounts for excessive amounts charged off in prior years.

The entries made on your books in 1909 apparently made no change whatever in the Asset Accounts but reduced their net value through an increase in the reserves.

Inasmuch as the reserve accounts were properly adjusted in the Agent's report and prior charge-offs restored, it is

held that no further adjustment in this respect is warranted.

(d) Relative to the write-off of the Bemis Tennessee Plant represented by the amount charged as an expense on the books of the corporation in the construction of the Y. M. C. A. it is found that the amount charged off was $12,471.22 instead of $49,884.84. This does not appear to represent a capital expenditure for the corporation and its restoration to invested capital is denied.

(e) The alleged write-down of the Bemis Plant at Bemis, Tennessee, in 1901, in the amount of $33,599.34 is found to represent items amounting to $15,533.78, which are properly expensed, $18,065.56 of the amount represents a direct credit to profit and loss and thus is already included in invested capital through surplus.

(f) Your contention for the restoration of printing equipment charged to expense in the amount of $851,375.50, has been given careful consideration and it is found that all labor costs and material costs for patterns, plates, type and mats are charged directly to expense accounts in the current taxable years and it is believed such charges are proper. However, the stero metal used in producing the patterns and plates inasmuch as it has a life of several years should be capitalized at cost. The average cost of such metal from 1905 to 1916, inclusive, is $.0893 per pound. The average cost for a term of years prior to 1917 should be used instead of the average cost subsequent to that date, in determining the value of such metal on hand January 1, 1917. [fol. 72] The value is therefore determined as follows:

Weight of metal on hand January 1, 1917	1,448,745 lbs.
Average cost per pound	$.0893
Value of metal 1,448,745 x $.0893	$129,372.93

The amount of $129,373.93 is, therefore, restored to Printing Equipment and the balance of the $851,375.50, or $722,002.57, is disallowed for restoration to invested capital on the ground that it has been properly charged to expense. Since replacements to metal are expense no depreciation is allowable.

(g) Relative to the value of intangibles acquired in 1885 it is held that in accordance with regulations only such value

as intangibles possessed in the hands of the predecessor is allowable for invested capital purposes.

Net income for the last six years prior to incorporation is therefore used as the basis for determining the value of good will.

Fiscal year ended	Total income per books	Salary paid S. A. Bemis	Net income	Worth of tangible assets
11/30/1878.....	.....	.....	.....	$277,214.42
11/30/1879.....	$77,436.82	$12,906.14	$64,530.68	296,847.31
11/30/1880.....	97,531.71	16,255.28	81,276.43	355,342.68
11/30/1881.....	42,972.50	7,162.11	35,810.55	366,977.59
11/30/1882.....	52,452.00	8,742.00	43,710.00	409,057.59
11/30/1883.....	39,860.65	6,643.44	33,217.21	420,784.38
11/30/1884.....	36,874.20	6,145.70	30,728.50	.....
Totals...	$347,127.88	$57,854.67	$289,273.37	2,126,223.97
Average..	.....	9,642.44	$48,212.23	$354,370.66

Inasmuch as the above figures do not include any salary for the sole owner, Judson M. Bemis, and only net income after all proper deductions and allowances are made should be considered in the valuation, a deduction of the same amount allowed as salary to S. A. Bemis is made as a salary allowance for Judson M. Bemis, that is an average salary of $9,642.44.

Average net income before deducting salary allowance for J. M. Bemis	$48,212.23
Less:	
Salary allowance, J. M. Bemis average	9,642.44
Adjusted average net income	$38,569.79
8% applicable to tangible assets:	
(A. R. M. 34) 8% of $354,370.66	28,349.65
[fol. 73] Income applicable to intangibles	10,220.14
Income applicable to intangibles capitalized on the basis of 15% (A. R. M. 34)	68,134.27

The value of $68,134.27 is, therefore, allowed for intangibles acquired in 1885.

(h) Relative to the contention for the allowance of $56,659.92 paid-in surplus on account of the acquisition of the assets of the Texas Bag and Fiber Company in 1917, investigation discloses that there was no affiliation prior to July 1, 1917. The majority of stockholders of the Bemis Brothers Bag Company were not stockholders in the Texas Bag and Fiber Company.

No evidence is submitted to substantiate a market value higher than the cash price paid for the assets, and the fact that they were purchased for cash would appear to fix their market value at the price paid. The depreciation policy of the predecessor company is not shown and the book value of its assets if not sustained by the evidence at hand. The claim for paid-in surplus on account of this transaction is therefore disallowed.

(i) Investigation of your contention relative to the increase of inventory and decrease of fixed assets in the valuation of assets acquired from the Texas Bag and Fiber Company discloses that the reallocation results as follows:

Credit to buildings	$12,515.08
Credit to machinery and fixtures	6,174.15
	18,689.23
Increase in inventory	19,840.73
Credit to factory supplies	1,151.50
Net change in income for 1917	18,689.23

This represents an increase in purchases for 1917 and therefore a decrease in income for that year of $18,689.23.

Inasmuch as fixed assets are reduced depreciation deductions should also be reduced and income correspondingly increased from July 1, 1917 and for subsequent years.

Your contentions for consideration under Section 210 of the Revenue Act of 1917 for 1917 and of Sections 327 and 328 of the Revenue Act of 1918 for 1918 and 1919, have been duly considered and no new evidence has been found to [fol. 74] show that your invested capital or net income is affected by abnormal conditions which would justify the Bureau in computing your tax under the above-mentioned relief sections for any of the years involved.

The computation of your tax liability for 1917 under the provisions of Section 210 of the Revenue Act of 1917 and for 1918 and 1919 under the provisions of Sections 327 and 328 of the Revenue Act of 1918 is, therefore, denied.

The recomputation of your tax liability in accordance with the above findings follows:

Years	Overassessment
1917	$32,675.42
1918	14,054.18 (Barred)
1919	9,073.15 (Barred)
Total Overassessment	55,802.75
Net Overassessment allowed	32,675.42

1917

Net income shown on your amended return	$9,724,880.11
Plus:	
1. Reduction in the amount of depreciation allowed	310.38
Total	$9,725,190.49
Less:	
2. Increase in purchases	18,689.23
Adjusted net income	$9,706,501.26

1. Depreciation is reduced from July 1, 1917 by 2% on $12,515.08, building account, and 6% of $6,174.15, machinery and fixtures which were reallocated to inventory in the assets acquired from the Texas Bag and Fiber Company.

2. Income is reduced by the amount of increase allowed in the inventory purchased from the Texas Bag and Fiber Company.

Invested Capital

Invested capital January 1, 1917, as shown by your amended return	$16,536,924.93
Plus:	
1. Value of Stereo-metal restored to the asset accounts	129,372.93
2. Value allowed for good will acquired in 1885	68,134.27
Adjusted invested capital	$16,734,432.13
Percentage deduction 9%	1,506,098.89
Specific deduction	3,000.00
Total deduction	$1,509,098.89

1 and 2. See explanation of allowances on prior pages of letter.

[fol. 75] Computation of Tax

% of capital	Income	Deductions	Balance subject to tax	Rate	Amount of tax
15%	$2,510,164.82	$1,509,098.89	$1,001,065.93	20%	$200,213.19
5%	836,721.61	.....	836,721.61	25%	209,180.40
5%	836,721.61	.....	836,721.61	35%	292,852.56
5%	1,338,754.57	.....	1,338,754.57	45%	602,439.56
Balance	4,184,138.65	.....	4,184,138.65	60%	2,510,483.19
Total	9,706,501.26	1,509,098.89	8,197,402.37		3,815,168.90
Excess profits tax					3,815,168.90
Net income			9,706,501.26		
Less:					
Excess profits tax			3,815,168.90		
Amount subject to 2% and 4% tax			5,891,332.36		
Amount of tax at 2%					117,826.65
Amount of tax at 4%					235,653.29
Total tax assessable					$4,168,648.84

Tax previously assessed:	
Original assessment, #36750608	4,183,481.82
Additional assessment, May 1920, page 18, Line 6	17,842.44
Total tax assessed	4,201,324.26
Total tax assessable, 1917	4,168,648.84
Overassessment	$32,673.42

1918

Net income shown on amended return	$10,153,439.00
Plus:	
1. Reduction in depreciation	620.75
Adjusted net income	10,154,059.75

1. See explanation for 1917.

Invested Capital

Invested capital shown on amended return	$21,873,300.70
Plus:	
1. Value of Stereo-metal restored	129,372.93
2. Value allowed for good will	68,134.37
3. Depreciation reduced 1917	310.38
4. Decrease in prorated tax for the prior year $32,675.42 x .55068	17,993.70
Total	22,089,111.98

[fol. 76]

Less:	
5. 1917 income reduced through inventory purchased from Texas Bag and Fiber Company	18,689.23
Adjusted invested capital	22,070,422.75
Average invested capital prewar period	10,094,253.54
Increase	11,976,169.21

1 to 5, inclusive, Items are already explained in this letter in previous paragraphs.

Excess Profits and War Profits Credit

8% of invested capital	1,765,633.82
Specific exemption	3,000.00
Excess profits credit	$1,768,633.82
Average prewar net income	2,091,525.88
Plus:	
10% of increase	1,197,616.92
Total	$3,289,142.80
Exemption	3,000.00
War profits credit	$3,292,142.80

Computation of Tax

% of capital not over	Income	Excess profits credit	Amount subject to tax	Rate	Amount of tax
20%	$4,411,000.79	$1,768,633.82	$2,642,366.97	30%	$792,710.09
Balance	5,743,058.96		5,743,058.96	65%	3,732,988.32
Total	10,154,059.75	1,768,633.82	8,385,425.93		4,525,698.41

Net income	10,154,059.75	
Less:		
War profits credit	3,292,142.80	
Balance	6,861,916.95	
80% of balance	5,489,533.56	
Less:		
Excess profits tax	4,525,698.41	
War profits tax		963,835.15
Total profits tax		$5,489,533.56
Net income	10,154,059.75	
Less:		
Interest on U. S. Obligations not exempt. $46,737.32		
Profits tax 5,489,533.56		
Exemption 2,000.00		
[fol. 77]	5,538,270.88	
Amount taxable at 12%	4,615,788.87	
Amount of tax at 12%		553,894.66
Total tax		6,043,428.22
Less:		
Profits taxes paid to Canada		10,754.12
Net tax assessable		6,032,674.10
Tax previously assessed:		
Original assessment, #401199		5,947,513.30
Additional assessment, March 1920, Page 17, Line 9		99,214.98
Total tax assessed		6,046,728.28
Net tax assessable		6,032,674.10
Overassessment		14,054.18

1919

Net income shown on return	$9,516,099.10
Plus:	
1. Depreciation disallowed in Revenue Agent's report August 25, 1920	77,666.16
2. Additional reduction of depreciation	620.75
Adjusted net income	9,594,385.01

1. Depreciation is computed in accordance with article 161, Regulations 45, as shown in the depreciation schedule attached to the Revenue Agent's report of August 25, 1920.

2. Depreciation in the amount of depreciable assets reallocated to inventory in 1917 is restored to income.

Invested Capital

Invested capital shown in Schedule B, Page 7, Revenue Agent's report	$25,644,428.89
Plus:	
1. Value of Stereo Metal restored	129,372.93
2. Value allowed for good will	68,134.27
3. Depreciation reduced in 1917 and 1918	931.13
4. Decrease in the prorated tax for prior year, $14,054.18 x .4226	5,939.29
Total	$25,848,806.51
Less:	
5. Reduction to surplus through 1917 income reduction on account of adjustment to assets purchased from Texas Bag and Fiber Company	18,689.23
Adjusted invested capital	25,830,117.28

[fol. 78] 1 to 5, inclusive. All adjustments are explained in this letter in previous paragraphs.

Excess Profits Credit

8% of invested capital	2,066,409.38
Exemption	3,000.00
Excess profits credit	2,069,409.38

Computation of Tax

% of Capital	Income	Credit	Amount subject to Tax	Rate	Amount of Tax
20%	$5,166,023.46	$2,069,409.38	$3,096,614.08	20%	$619,322.81
Balance	4,428,362.55	.....	4,428,362.55	40%	1,771,345.02
Totals	9,594,386.01	2,069,409.38	7,524,976.63		2,390,667.83

Profits tax for 1919			$2,390,667.83
Net income		$9,594,386.01	
Less:			
Interest on United States Obligations	$49,284.17		
Profits Tax	2,390,667.83		
Exemption	2,000.00	2,441,952.00	
Amount taxable at 10%		7,152,434.01	
Amount of tax at 10%			715,243.40
Total tax			$3,105,911.23
Less:			
Profits taxes paid to Canada			115,229.56
Net tax assessable			2,990,681.67
Tax previously assessed:			
Original assessment, #402600			2,965,124.51
Additional assessment, November, 1920, Page 9, Line 16			34,630.31
Total Tax assessed			2,999,754.82
Net tax assessable			2,990,681.67
Overassessment			$9,073.15

In view of the above your claim for the refund of $35,355.79, income and profits taxes for 1917, will be allowed for $32,675.42 and your claim for the refunding of $1,770,104.23 for 1917 will be rejected in full, in the next schedule to be approved by the Commissioner.

Inasmuch as computation of your tax liability for 1918 and 1919 under the provisions of Sections 327 and 328 of the Revenue Act of 1918 is denied and your claim for the refunding of $1,270,907.97 for 1918 is confined to that point, [fol. 79] it will be rejected in full in the next schedule to be approved by the Commissioner.

Your claim for the computation of your tax liability for 1919 under the provisions of Sections 327 and 328 has already been rejected.

The overassessments indicated for 1918 and 1919, not being covered by proper claims are barred by the Statute of Limitations and cannot be allowed.

The overassessment for 1917 shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official, in accordance with Section 284 of the Revenue Act of 1926.

A copy of this communication has been furnished to your authorized representatives, Messrs. Lowenhaupt and Waite, 830 Pierce Building, St. Louis, Missouri.

Respectfully, C. B. Allen, Deputy Commissioner.

EXHIBIT "I"

Lowenhaupt & Waite, Attorneys-at-law, Suite 928-932 Planters Building, Saint Louis, Mo.

Abraham Lowenhaupt, Stanley S. Waite

December Twenty-second, 1927.

Commissioner of Internal Revenue, Washington, D. C.

Reference: IT:FAR:A1—CAB. Bemis Bro. Bag Company, 601 S. Fourth Street, St. Louis, Mo. Claims for refund. Your letter dated Dec. 17, 1927.

[fol. 80] DEAR SIR: We are in receipt of your letter above referred to listing your findings of overassessment as follows:

1917	$32,675.42	
1918	14,054.18	(barred)
1919	9,073.15	(barred)
Total overassessment	$55,802.75	
Net overassessment allowed	$32,675.42	

We have examined the findings in your letter hurriedly and feel satisfied that the denial of special assessment and of the restoration to invested capital of many of the items submitted and of the calculation of the cost of others, is unduly harsh and is not justified by the facts. We are not, however, prepared to submit the data or the reasons for our objections at this time.

We now direct your attention to the fact that your finding that no claims for refund for the years 1918 and 1919, sufficient to sustain this right and to prevent the running of the statute of limitations were filed, is not sustained by the facts. Upon the basis that the claims for refund do not show the right to relief, which is now found, you rule that the overassessments for the last mentioned two years are barred.

You also state in your letter that the claim for refund for 1919 has been heretofore overruled. In this connection your attention is called to the fact that this ruling was immediately suspended and the taxpayer was granted further consideration of his claim.

As to the sufficiency of the claims for refund filed, you apparently have overlooked the following facts.

The claims for refund for 1918 and 1919 are identical and it will be sufficient to refer to one of them. The claim for refund for 1918, filed in January, 1924, is typical and states:

"Deponent verily believes that this application should be allowed for the following reasons:

"The Excess Profits Tax and War Profits Tax against this company for the year 1918 should be assessed under the provisions of Section 327 and 328 of the Revenue Act of 1918.

"The facts and argument in support of this claim are contained in a brief, duly verified, which has been filed with [fol. 81] the Commissioner of Internal Revenue, in support of a claim for refund made in connection with the company's return for 1917 and the tax paid thereon. The facts and circumstances which entitle the company to assessment under said sections for 1917 obtained also in 1918. In order to simplify matters and avoid repetition, the brief filed with the claim for refund for 1917 (a copy of which brief is attached hereto) by reference thereto is made a part of this claim."

The printed brief filed for the year 1917 was attached to the claim for 1918 (and the claim for 1919), filed therewith and by reference thereto made a part thereof.

In said brief the following statements occur:

Page 5:

"The items that we have discovered are such as might properly have been capitalized, but the entries made which would have resulted in their capitalization were afterwards reversed by the officers of the Company."

Page 14:

"If the value of the respective kinds of property could be satisfactorily determined this Company would be entitled to additional invested capital under the provisions of Article 57 of Regulations 44 and T. B. R. 49 and A. R. R. 307."

Page 15:

"Upon any proper accounting of the purchases, mergers and consolidations above stated, value and cost should be assigned to the good-will of the companies acquired."

Page 27:

"(1) A large part of the cost of construction, betterment and repair of plants and equipment and the total cost of its printing plates was charged to expense in the years prior to 1917."

Items entitled St. Louis Bag Factory, Bemis Cotton Mill Plant and Brand Printing Plates were all listed in said

brief as items which should be restored to invested capital as stated in the first quotation from the brief above written, and the good will is claimed as an addition to invested capital as appears from the quotation from page 14. Every fact to which you have given effect as invested capital in calculating this overassessment was cited and claimed as such in said brief.

[fol. 82] All of the facts upon the right to the restoration of the items to invested capital resulting in the overassessment, which you have now found, were submitted to the Commissioner of Internal Revenue at that time and he was fully advised of them. We asserted in connection with such facts that the exact costs of these items could not be determined and therefore the invested capital of the taxpayer could not be determined and, on that basis, prayed for special assessment. You have now found that the cost can be determined.

The purpose of a claim for refund is to advise the Commissioner of Internal Revenue of the facts and it thereupon becomes his duty to apply the law to such facts. This claim for refund fully advised the Commissioner of all the facts upon which this assessment is now based. It is true that the overassessment is found upon a different basis from that upon which it was prayed but in this kind of a proceeding the prayer for relief is never a part of the cause for action. In Corpus Juris, Vol. 31, p. 110, concerning pleadings in actions at law in code states, the law is stated as follows:

"The prayer for relief forms no part of the statement of the cause of action; and it is unimportant unless there is ambiguity in such statement. A bad prayer for relief or a prayer for improper relief will not vitiate a pleading which is otherwise sufficient. The facts alleged, and not the relief demanded, are of chief importance, and they determine the relief to be granted."

The only purpose of a claim for refund is to advise the Commissioner of the facts, in order that he may pass upon the merits and result of such facts under the law. The mere fact that the taxpayer asks that they be given a certain effect does not deprive him of the right to the other effect to which the Commissioner finds that they are entitled.

In Tucker vs. Alexander, 15 Fed. (2nd) 356 (later reversed by the Supreme Court) the Court gave effect to all of the government's contentions concerning the necessity for a claim for refund based upon the facts upon which the suit is brought. The Court says in that case:

"The evident purposes and objects of this condition are to afford the Commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto. Unless the claimant were required to present to the Commissioner all [fol. 83] of the grounds upon which he relies for refund, the above purposes and objects would be partially or entirely defeated. The resort to the courts is allowed only because the Commissioner will not correct the wrong claimed to have been done."

In the Tucker case, as the Court states, the claim for refund was general in its terms but was made specific through the incorporation of a letter from the deputy commissioner which set forth the grounds of protest. However there were no facts set out in said claim in support of the grounds asserted. Consequently it was impossible for the Commissioner to decide the question set forth in taxpayer's petition when he considered the claim.

Of course, no such situation is presented by the instant case. While the relief asked on the face of the printed form was by way of special assessment, still the printed brief which was incorporated in the claim for refund plainly set out all the facts and states that if the cost of the items can be found it should be restored to invested capital. With these facts and this prayer before the Commissioner, he was in duty bound under the claim as filed to restore to invested capital the items that had been written off the books and the cost of other items, provided they could be ascertained.

When the Tucker case reached the Supreme Court of the United States (Tucker vs. Alexander, Decided November 21, 1927) that court reversed the decision of the Circuit Court of Appeals and held that the government had waived any objection to the sufficiency of the description of the

claim filed by failure to make this an issue in the trial court. The court used this significant language:

"But no case appears to have held that such objections as that urged here may not be dispensed with by stipulation in open court on the trial. The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitation. If the Commissioner is not deceived or misled by the failure to describe accurately the claim as obviously he was not here, it may be more convenient for the government and decidedly in the interests of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon gov- [fol. 84] ernment and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose."

You will note that the Supreme Court held that even where the issues raised by the taxpayer at the trial of the case were not set out in the claim for refund at all, the objection may be waived on the part of the government especially if the Commissioner is not deceived or misled by failure to describe accurately the claim.

While, as above stated, our claim is technically sufficient to permit the refund of the overpayments, still, if it were not you are in a position to follow the court's ruling in the Tucker case and to waive a defect in the description of the claim filed, inasmuch as all the facts are stated and you could not possibly have been deceived.

While we are convinced that you will, after having had these matters brought to your attention, hold that our claims are sufficient, still, even though there is yet some doubt in your mind, we presume you desire to do exact justice in all cases and not withhold money due a taxpayer on a mere technicality which the highest court has held may be waived.

We respectfully ask your reconsideration of this matter and the reversal of your ruling as to the years 1918 and 1919.

Yours very truly, Lowenhaupt & Waite, Hopkins, Starr, Hopkins & Hamel, Attorneys for Bemis Bros. Bag Company.

EXHIBIT "K"

IT:E:RR. JSR

January 20, 1928.

Lowenhaupt and Waite, 928-32 Planters Building, St. Louis, Missouri.

SIRS: Reference is made to your letter of December 22, 1927, referring to office letter dated December 17, 1927, which advised you of the overassessments disclosed for the [fol. 85] years 1917, 1918 and 1919 in favor of the Bemis Brothers Bag Company, St. Louis, Missouri, and also that the overassessments for the latter two years were barred from allowance by the statutory period of limitation applicable to the years 1918 and 1919 due to the failure of the taxpayer to file timely refund claims.

You contend that the action taken by the Bureau is erroneous inasmuch as refund claims were filed for the years 1918 and 1919 and that attached to each claim and made a part thereof, was a copy of the printed brief upon which the adjustments for 1918 and 1919 were based. The claim for 1918 which is identical with that filed for 1919 reads as follows:

"Deponent verily believes that this application should be allowed for the following reasons:

"The Excess Profits Tax and War Profits Tax against this Company for the year 1918 should be assessed under the provisions of Section 327 and 328 of the Revenue Act of 1918.

"The facts and argument in support of this claim are contained in a brief, duly verified, which has been filed with the Commissioner of Internal Revenue, in support of a claim for refund made in connection with the company's

return for 1917 and the tax paid thereon. The facts and circumstances which entitle the company to assessment under said sections for 1917 obtained also in 1918. In order to simplify matters and avoid repetition, the brief filed with the claim for refund for 1917 (a copy of which brief is attached hereto) by reference thereto is made a part of this claim."

The purpose of the brief was to substantiate your position that the invested capital of the company could not be determined and that the company was, accordingly, entitled to consideration under the provisions of Section 210 of the Revenue Act of 1917, and Sections 327 and 328 of the Revenue Act of 1918. The claims for refund were filed in order that any refund due the company in event that special assessment were allowed would not be barred by the statutory period of limitations.

Upon consideration of the brief the company was denied special assessment for the years 1917, 1918 and 1919. Certain adjustments were made, however, to the company's invested capital which decreased the company's tax liability [fols. 86 & 87] for those years. The overassessments for 1918 and 1919 resulted from the adjustments made with respect to 1917.

This office has carefully considered the contentions set forth in your letter and has come to the conclusion that in view of the fact that the basis of the claims filed for 1918 and 1919 was special assessment and since special assessment was denied no further action may be taken with respect to such claims.

Regarding the case of Tucker v. Alexander mentioned in your letter you are advised that the facts in that case and those in the instant case are totally dissimilar. In the Tucker case the statutory period of limitation within which a claim for refund could be filed for the year involved had not expired and in order to avoid further litigation the Commissioner and the taxpayer stipulated as to the agreed facts which should be presented to the court for a decision.

The instant case is, accordingly, closed on the basis of office letter dated December 17, 1927.

Respectfully, (Signed) C. B. Allen, Deputy Commissioner.

JB-4.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 88] Appearances of counsel omitted in printing.

[fol. 89] Minute entry of argument and submission, May 23, 1932, omitted in printing.

[fol. 90] In United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1932

No. 9415

Bemis Bro. Bag Company, a Corporation, Appellant,

vs.

United States of America, Appellee

Appeal from the District Court of the United States for the Eastern District of Missouri

Mr. Abraham Lowenhaupt (Mr. Spencer M. Thomas and Messrs. Lowenhaupt & Waite were with him on the brief) for appellant.

Mr. Frederick W. Dewart, Special Attorney, Bureau of Internal Revenue (Mr. Louis H. Breuer, United States Attorney, Mr. Claude M. Crooks, Assistant United States Attorney, and Mr. C. M. Charest, General Counsel, Bureau of Internal Revenue, were with him on the brief), for appellee.

Before Gardner and Sanborn, Circuit Judges, and Nordbye, District Judge

Opinion—Filed Aug. 29, 1932

Nordbye, District Judge, delivered the opinion of the court:

This action was brought to recover income and excess profits taxes paid by appellant for the years 1918 and 1919.

The collector to whom the taxes were paid having gone out of office, the action was brought directly against the United States. The action was tried to the Court without a jury [fol. 91] on an agreed statement of facts. The only question presented to the lower court was whether or not the plaintiff in its claim for refund, at any time before the running of the statute of limitations, stated the facts or grounds upon which it asserted its right to a refund.

Paragraph 18 of the stipulation provides as follows:

"If the appellant within the time provided by law, filed claims for refund for the years 1918 and 1919 respectively, which under the law were sufficient to be the required preliminary for the maintenance of this action on that ground, above stated, then appellant may be entitled to judgment for the year 1918 in the amount of $14,054.18, with interest, and for the year 1919 in the amount of $9,073.15, with interest.

If the claims for refund filed by the appellant for the years 1918 and 1919 respectively, were not sufficient under the law to be the required preliminary for the maintenance of this action on that ground, the appellee will be entitled to judgment dismissing this action."

The appellant on February 29, 1924, filed its claim for refund for 1918 of $1,270,907.97, and on December 12, 1924, its claim for refund for 1919 in the sum of $606,546.13. These claims for refund were based on the contention that the excess profits tax and war profits tax should be assessed under the provisions of Sections 327 and 328 of the Revenue Act of 1918. These sections are relief statutes enacted for the purpose of relieving a taxpayer from an excessive tax. Provision is made in Section 327 for cases where the Commissioner is unable to determine the invested capital of the taxpayer and in Section 328 it is provided that "in the cases specified in Section 327, the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to the average net income (in excess of the specific exemption of $3,000) for such year."

In filing its claims for refund for the years 1918 and 1919, reference was made to a brief theretofore filed in [fol. 92] support of the claim for refund for the 1917 taxes, and an additional brief was filed in support of the claims for refund for the years 1918 and 1919. The claim for refund for the year 1918 stated the following:

"Deponent verily believes that this application should be allowed for the following reasons: The Excess Profits Tax and War Profits Tax against this company for the year 1918 should be assessed under the provisions of Sections 327 and 328 of the Revenue Act of 1918.

The facts and argument in support of this claim are contained in a brief, duly verified, which has been filed with the Commissioner of Internal Revenue, in support of a claim for refund made in connection with the company's return for 1917 and the tax paid thereon. The facts and circumstances which entitle the company to assessment under said sections for 1917 obtained also in 1918. In order to simplify matter and avoid repetition the brief filed with the claim for refund for 1917 (a copy of which brief is attached hereto) by reference thereto is made a part of this claim."

The brief attached to the claim for refund and by reference made a part of it states as follows:

"In re Claim of Bemis Bro. Bag Company for Refund of Taxes for the Year 1917 Based Upon Right to Special Assessment

To the Honorable Commissioner of Internal Revenue, Washington, D. C.:

Bemis Bro. Bag Company has heretofore filed its claim for refund of taxes for the year 1917, based upon the right to assessment of its Excess Profits Taxes under Section 210 of the Revenue Act of 1917. It now desires to elaborate and present in detail the reasons why its Excess Profits Tax for said year should be so determined.

Statement

The facts are hereafter stated in the order and under the subdivision above writtten.

I. Reasons why the tax should be so determined and the facts upon which such reasons are based.

V. Relief sought.

[fol. 93] Relying upon the sufficiency of the facts above recited to entitle it to the assessment of its Excess Profits Tax liability under the provisions of Section 210 of the Revenue Act of 1917, Bemis Bro. Bag Company has heretofore presented a claim for refund for the year 1917."

A similar statement and a similar reference to the 1917 brief was used in filing the claim for refund for the year 1919.

The appellant in filing its claim for refund for the years in question, in the brief above referred to, attempted to set forth in substantiation of its claim, the fact that injustice would be done if it were not permitted to receive the benefit of the special assessment provided in Sections 327 and 328 of the 1918 Revenue Act. It proceeded to set forth in detail the various phases of its business which made it difficult to determine the values of the several classes of property that were paid in for stock. It is quite apparent that the appellant was concerned over the large tax it was required to pay to the Government, and felt that the relation of its income to its invested capital was strikingly abnormal. It set out a large number of reasons why it was entitled to a tax based on a comparison with representative corporations engaged in a like or similar business. Instances were cited of the accounting policy of the company in previous years where expenditures were charged to expense or profit and loss, when good accountancy would have justified the capitalization thereof. As an example of the conservative methods employed by the company, reference was made to certain printing plates which are used for the purpose of printing the various brands on the bags that are manufactured by the appellant. That is, the appellant is equipped to print upon the bags manufactured, the user's brands. During the years it has been in business, it has accumulated a large amount of printing sets for the printing of user's brands, which it contended were reasonably worth $851,375.50. The value was accordingly to the taxpayer something more than the mere consideration of bare

labor and material that went into the manufacture of the printing set. It represented the results of alert business solicitation and advertising with years of service that has been rendered by it to its customers; consequently, it contended in this presentation to the Commissioner, that the printing equipment represented an accumulation of years of good-will, and although expense had been charged from [fol. 94] year to year for the actual outlay for labor and material, no portion of this value had ever been added to the invested capital.

The facts concerning the original incorporation of the company and the early history of the corporation were presented to substantiate the failure on the part of the company to capitalize its goodwill in the proper amount. New plants, it was contended, had been obtained from time to time, and no good-will value was set up on the books for the different properties that were acquired in the long period of time that it had been engaged in the manufacturing business. Failure to properly capitalize certain patent rights was also set forth in the taxpayer's brief. Not all the various items which were incapable of proper valuation and which should have gone into capital were set forth. It was merely the intention of the taxpayer as disclosed by its brief, to throw some light upon what appeared to be abnormal profits upon which it was assessed; and it was contended by the taxpayer that the showing made entitled it to the special assessment that it requested. In other words, the various phases of the business of the taxpayer were set forth in order that the Commissioner would be convinced that the large taxes that had been assessed arose on account of under-capitalization, rather than excessive profits.

Section 156, Title 26, U. S. C. A. provides that:

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue according to the provisions of the law in that regard,

and the regulations of the Secretary of the Treasury established in pursuance thereof. * * *"

The statute of limitations applicable fixes the time for filing such claim at four years after the payment of any part of the taxes. The claims filed on February 29, 1924, and December 12, 1924, were timely, and were duly considered by the Commissioner on their merits. On October [fol. 95] 30, 1926, a communication was sent by the Treasury Department to the taxpayer, a portion of which reads as follows:

"You are advised that after careful consideration and review your application under the provisions of Section 327 of the Revenue Act of 1918 has been denied for the reason that the evidence presented fails to establish that your invested capital or net income is affected by abnormal conditions which would justify the Bureau in computing your tax under the provisions of Section 328 of the above mentioned Act.

In accordance with the above conclusions, your claim for refund will be rejected in full."

On November 27, 1926, a second communication was sent by the Treasury Department to the taxpayer, a portion of which reads as follows:

"After careful consideration and review, your application under provisions of Sections 210 and 327 of the Revenue Acts of 1917 and 1918 for assessment of your profits tax as prescribed in Sections 210 and 328 of the above mentioned Acts has been denied, inasmuch as the audit disclosed no exceptional hardship evidenced by gross disproportion between the tax computed by reference to representative concerns specified in Sections 210 and 328.

In accordance with the above conclusions, your claims for refund of $1,770,104.23 and $35,355.79 for 1917 and $1,270,907.97 for 1918 will be rejected in full."

It is clear that the claim for special assessment for the years 1918 and 1919 was rejected by these letters. On December 13, 1926, after the statute of limitations had run on these claims, the appellant sent to the Commissioner a

communication referring to the rejection and among other things said:

"We protest against the rejection of said claims for refund for the following reasons:

(a) The excess profits tax against the Company for the year 1917 should be determined under Section 210 of the Revenue Act of 1917 and the excess profits and war profits taxes for the years 1918 and 1919 should be determined [fol. 96] under Section 328 of the Revenue Act of 1918. The denial of said right must be based upon the use of improper comparatives as representative.

(b) If the assessment of the excess profits taxes against the Company in the manner claimed in the above subdivision is denied, then the items heretofore presented which have been improperly eliminated from invested capital should be restored to invested capital and the excess profits tax recalculated on that basis."

Further communication was sent by the taxpayer under date of April 12, 1927. Under date of December 17, 1927, the Commissioner wrote advising that the claims for the years 1917, 1918 and 1919 had been reconsidered in connection with the taxpayer's protest, and the entire matter was then reviewed by the Commissioner, and the following is a portion of the communication so sent:

"In view of the above, your claim for the refund of $35,355.79, income and profits taxes for 1917, will be allowed for $32,675.42 and your claim for the refunding of $1,770,104.23 for 1917 will be rejected in full, in the next schedule to be approved by the Commissioner.

Inasmuch as computation of your tax liability for 1918 and 1919 under the provisions of Sections 327 and 328 of the Revenue Act of 1918 (provision for special assessment) is denied and your claim for the refunding of $1,270,907.97 for 1918 is confined to that point, it will be rejected in full in the next schedule to be approved by the Commissioner.

Your claim for the computation of your tax liability for 1919 under the provisions of Sections 327 and 328 has already been rejected.

The over-assessments indicated for 1918 and 1919 not being covered by proper claims are barred by the Statute of Limitations and cannot be allowed."

In the review that was made by the Commissioner, the printing equipment items were considered, and it was determined by the Commissioner that the stereo metal used in producing the patterns and plates should be capitalized at cost in that it had a life of some years. The following is quoted from the Commissioner's letter of December 17, 1927:

[fol. 97] "Your contention for the restoration of printing equipment charged to expense in the amount of $851,375.50, has been given careful consideration and it is found that all labor costs and material costs for patterns, plates, type and mats are charged directly to expense accounts in the current taxable years and it is believed such charges are proper. However, the stereo metal used in producing the patterns and plates inasmuch as it has a life of several years should be capitalized at cost. The average cost of such metal from 1905 to 1916, inclusive, is $.0893 per pound. The average cost for a term of years prior to 1917 should be used instead of the average cost subsequent to that date, in determining the value of such metal on hand January 1, 1917."

The Commissioner then determined that the amount of $129,372.93 should be restored to printing equipment, and that the balance of the $851,375.50, or $722,002.57, should be disallowed for restoration to invested capital on the ground that it had been properly charged to expense. In making his computations, the Commissioner found that after restoring the amount of $129,372.93 to the printing equipment, there had been an overassessment of $14,054.18 in the tax paid for the year 1918, and $9,073.15 in the tax paid in the year 1919. The overassessments for the year 1917 were allowed, however, for the years 1918 and 1919 they were disallowed by the Commissioner because he contended that no proper claims had been filed before these claims were barred by the statute of limitations.

The fact that the Commissioner took it upon himself in considering the 1917, 1918 and 1919 taxes, to reconsider the entire application, would not be of any avail to the appellant if in truth and in fact, the claim for refund sued upon herein was not filed with the Commissioner within the statutory period. It is not seriously contended by the appellant that the Commissioner waived any rights of the Government by his communication of December 17, 1927. The Commis-

sioner would have no authority to extend the statute of limitations after the expiration thereof. The letter of December 13, 1926, from the appellant to the Commissioner was written after the claims filed in 1924 were denied and after the statute of limitations had expired. The only question, therefore, presented to this Court is whether or not the claims for refund filed by appellant on February 29, 1924, and December 12, 1924, were sufficient, under the law, to be [fol. 98] the required preliminary for the maintenance of this action, which is based on over-payment of its taxes for 1918 and 1919 on the grounds that its invested capital is a larger amount than was set forth in its return for those years. The trial court held that the original application asked for a special assessment and in its application for special assessment, there was no indication that the taxpayer contended that it was entitled to a reduction of its taxes on the ground that there was certain printing material that should have been added to its invested capital. In other words, the trial court held that this action is based upon a new and inconsistent ground compared to the original application for tax refund, and that for the reason that the original claim for refund did not state the grounds which are the basis for this suit, that no recovery can be had herein.

In the case of Tucker v. Alexander, 15 Fed. (2d) 356, 357, the Court stated:

"Therefore, we think it is a required precedent or limitation that the action shall be upon the same grounds and only such as are presented in the claim. As no ground in this petition is stated in the claim for refund, we think this petition has no standing under the issues tendered by the petition."

In the case of Red Wing Malting Co. v. Willcuts, 15 Fed. (2d) 626, 634, the Court stated:

"The precise ground upon which the refund is demanded must be stated in the application to the Commissioner, and we think, if that is not done, a party cannot base a recovery in the Court upon an entirely different and distinct ground from that presented to the Commissioner."

In the case of United States v. Felt and Tarrant Manufacturing Company, 283 U. S. 269, the Supreme Court had

a very similar question presented to it. In that case, the taxpayer filed a claim for refund asking for special assessment as in the instant case. This was denied and it brought suit on the basis that its gross income should be decreased by items of exhaustion or obsolescence of patents. The Supreme Court said on Page 271:

"That section provides for a special method of assessment of excess profits taxes in any case where the Secre- [fol. 99] tary of the Treasury is unable satisfactorily to determine the invested capital of the taxpayer. It has no relation to deductions from gross income on account of exhaustion or obsolescence of patents. In support of its claim, which was ultimately allowed in part, respondent prepared and filed a brief, and an oral argument was held in the office of the Commissioner; but neither in its claim for refund, its brief, nor at the hearing, was mention made of the deduction now claimed.

"The filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon by the defendant, whether the collector or the United States. Tucker v. Alexander, 275 U. S. 228; Maryland Casualty Co. v. United States, 251 U. S. 342, 353, 354; Kings County Savings Institution v. Blair, 116 U. S. 200; Nichols v. United States, 7 Wall. 122, 130.

"One object of such requirements is to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue, Nichols v. United States, supra, page 130, a purpose not accomplished with respect to the present demand by the bare declaration in respondent's claim that it was filed 'to protect all possible legal rights of the taxpayer.' The claim for refund, which section 1318 makes prerequisite to suit, obviously relates to the claim which may be asserted by the suit. Hence, quite apart from the provisions of the Regulation, the statute is not satisfied by the filing of a paper which gives no notice of the amount or nature of the claim for which the suit is brought, and refers to no facts upon which it may be founded.

"The Court of Claims, in allowing recovery, relied upon Tucker v. Alexander, supra, and upon the fact that, at the time when respondent filed its return and its claim for re-

fund, the Treasury had consistently refused to allow deductions from gross income for exhaustion of patents. Consequently it held that the filing of a demand which was certain to be refused was a futile and unnecessary act. But in Tucker v. Alexander the right of the government to insist upon compliance with the statutory requirement was emphasized. Only because that right was recognized was it necessary to decide whether it could be waived. The court held that it could, and that in that case it had been waived by the stipulation of the collector filed in court. Here there [fol. 100] was no compliance with the statute nor was there a waiver of its condition, since the Commissioner had no knowledge of the claim and took no action with respect to it.

"The necessity for filing a claim such as the statute requires is not dispensed with because the claim may be rejected. It is the rejection which makes the suit necessary. An anticipated rejection of the claim which the statute contemplates, is not a ground for suspending its operation. Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and 'they mark the conditions of the claimant's right.' Rock Island R. R. Co. v. United States, 254 U. S. 141, 143. Compliance may be dispensed with by waiver, as an administrative act, Tucker v. Alexander, supra; but it is not within the judicial province to read out of the statute the requirement of its words. Rand v. United States, 249 U. S. 503, 510."

The appellant takes the position that in its original claim for refund, the Commissioner had called to his attention all the facts necessary to justify a reduction in its taxes on the basis of increased capital. However, it seems clear that the reference to the printing equipment presented in the original claim for refund was merely used as an illustration of the inability to determine the values of the invested capital in order to substantiate the right of the claimant to have its taxes assessed under Sections 327 and 328 of the Revenue Act of 1918. It was merely incidental. There is no particular similarity between a claim for refund based on a right of special assessment, and a claim for refund based on the right to have the invested capital increased. In fact, the appellant took the position, when its claim for refund was

originally presented, that the facts regarding its invested capital and value of property paid in for its stock, could not be determined, and for that reason, it insisted that its tax should be assessed as the average tax of representative corporations engaged in a like or similar trade or business. It may be that there is some confusion between the terms "facts" and "grounds" as used with reference to claims for tax refund. But the purpose in setting out facts is to advise the Commissioner of the grounds for tax reduction, and the original claim was predicated solely upon the right of special assessment. Any reference in the claim to the status of its printing equipment was merely referred to in [fol. 101] support of the taxpayer's right to special assessment. At least, one object of the requirement to set forth the facts in substantiation of the claim for refund is to advise the Commissioner so that there may be an orderly administration of the Revenue Department. United States v. Felt & Tarrant Mfg. Co., supra. If the appellant had in mind that it was entitled to a tax reduction on account of increased invested capital, there would have been no difficulty whatsoever in setting forth such a statement and asking for a reduction on such specific ground. The only purpose evidence by appellant in filing its claims was to obtain a special assessment in view of certain abnormal conditions and circumstances set forth in considerable detail in its brief in support of its claim. The Commission was asked to allow a special assessment. In view of these circumstances, no other claim was presented. The Commission's attention, before the claim was barred by the statute of limitations, was not called to any other claim for refund.

The Court, in the case of Mutual Life Ins. Co. of New York v. United States, 49 Fed. (2d) 662, seems to have had substantially this same question before it. On page 664 it said:

"Although the claim of August 2 stated certain facts with reference to the reserve funds at the beginning and end of the taxable year from which the 4 per cent of the mean of these reserve funds could be determined, they were stated, considered, and acted upon by the Commissioner for an entirely different purpose than that upon which the plaintiff now relies. No claim for refund of the nature as-

serted in this suit was ever made to the Commissioner until the application for reconsideration long after he had rejected the claim and after the statute of limitation for filing a claim had expired."

The claim for refund was prepared by the attorneys for appellant with considerable care. Great pains were taken in presenting to the Commissioner a voluminous brief in support of its contention that it was entitled to a special assessment. The Commissioner considered appellant's for some two years, and then formally denied it. If appellant intended to press a claim for refund before the statute of limitations expired on the grounds that its invested capital should be increased by certain printing equipment, there was no indication of any such intention prior to December [fol. 102] 13, 1926. The target at which appellant was aiming was the consent of the Commissioner to have its tax assessed according to Sections 327 and 328 of the Revenue Act of 1918. The fact that in aid of that objective certain facts appeared that might furnish grounds for a partial refund on an entirely different and inconsistent claim, could hardly be considered a preliminary requirement to a suit for such partial refund. Connell v. Hopkins, 43 Fed. (2d) 773; Lucas v. Pilliod Lumber Co., 281 U. S. 245; Maas & Waldstein Co. v. United States, 283 U. S. 583.

In accordance with the views herein expressed, the judgment of the lower court is affirmed.

[fol. 103] In United States Circuit Court of Appeals, Eighth Circuit

No. 9415

Bemis Bro. Bag Company, a Corporation, Appellant,

vs.

United States of America

Appeal from the District Court of the United States for the Eastern District of Missouri

Judgment—September 1, 1932

This cause came on to be heard on the transcript of the record from the District Court of the United States for the

Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed, without costs to either party in this Court.

[fol. 104] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

[Title omitted]

PETITION OF BEMIS BRO. BAG COMPANY FOR REHEARING—Filed Sept. 19, 1932

Bemis Bro. Bag Company, appellant, files this, its petition for rehearing, and presents the following:

1

This Court is in error in its statement of facts as follows:

(Page 6:) "It is clear that the claim for special assessment for the years 1918 and 1919 was rejected by these letters. On December 13, 1926, after the Statute of Limitations had run on these claims, the appellant sent to the Commissioner a communication referring to the rejection," etc.

(Page 8:) "The letter of December 13, 1926, from the appellant to the Commissioner, was written after the claims filed in 1924 were denied and after the Statute of Limitations had expired."

[fol. 105] This statement is repeated several times in substance.

This finding is the substantial basis of the result arrived at by the Court. Without it the Court's judgment must have been for the appellant.

The Court finds that the claims for refund were rejected solely upon the basis of a statement in the letters that the claims for refund will be rejected and by this finding concludes the case. The rejection of a claim for refund usually requires more than the mere writing of a letter. The official order must be entered in the records of the Treasury and the Collector is notified (U. S. v. Michel, 282 U. S. 656; Savannah Bank & Trust Co. v. Groves, U. S. Court of

Claims, May 31, 1932). The letters themselves disclose that something further was to be done before the rejection was effective.

A. The finding is contrary to all the facts in the case, as follows:

(a) This finding is directly contrary to the stipulation of facts. If the claims were rejected when these letters were written in November, 1926, then the suit filed in 1929 was barred by the Statute of Limitations limiting the time for filing suits to two years after the rejection of the claim (26 U. S. C. A., Par. 156). The stipulation that there is no defense to the suit if the claims for refund were sufficient, is directly contrary to the Court's finding that the claims for refund were rejected before December, 1926, when the amendments were filed.

(b) This finding is directly contrary to the presumption of facts. The date of rejection of the claims by the Commissioner of Internal Revenue was in the exclusive possession of defendant. If they were rejected, when the Court finds they were rejected, that fact was a complete defense in this case (26 U. S. C. A., Par. 156). The failure of defendant to produce the evidence should raise a conclusive presumption that the facts are no defense (Despard v. Pearcy, 65 W. Va. 140; Wilmer v. Placide, 119 Md. 49; 22 C. J. Evidence, Sections 53, 54). The presumption is made a certainty by defendant's complete failure at every stage of this case (including this appeal) to insist upon the perfect defense, which it had, if the facts found by the Court were true.

(c) The conduct of the Commissioner subsequent to these letters in the hearing and examination of the amendments to the claims is evidence that the intention to reject the [fol. 106] claims for refund was not put in execution and that they were not actually previously rejected (McKesson & Robbins, Inc., v. Edwards, 57 Fed. [2d] 147).

(d) The letter from the Commissioner of Internal Revenue, dated December 17, 1927, also quoted by the Court, states:

"Your claim for the refunding of $1,270,907.97 for 1918 * * * *will be rejected* in full in the next schedule to be approved by the Commissioner." (Emphasis ours.)

If the claim for 1918 had been rejected in November, 1926, it could not be rejected on December 17, 1927. It would be impossible to reject a claim already rejected.

(e) The letter by which the Court finds the 1918 claim was rejected included in identical terms the 1917 claim. But it appears in evidence that the 1917 claim was subsequently allowed and paid (Letter of December 17, 1927, Exhibit H). This is evidence that neither claim was rejected by the previous letter, because, as the Court says, the Commissioner had no power to waive the Statute of Limitations, which would have barred the refund by him for 1917 if he had rejected that claim a year previously.

(f) The letter of October 30, 1926 (Exhibit C), by which the Court finds the 1919 claim was rejected, itself states that the Collector will not be notified for thirty days. This, according to departmental procedure, withheld all action during that period to afford an opportunity to protest.

There is no evidence in the case to support this finding, and this finding is the substantial basis of the Court's conclusion, as follows:

On page 8 of its opinion the Court says:

"The letter of December 13, 1926, from the appellant to the Commissioner was written after the claims filed in 1924 were denied and after the Statute of Limitations had expired. The only question, therefore, presented to this Court is whether or not the claims for refund filed by appellant on February 29, 1924, and December 12, 1924, were sufficient, under the law, to be the required preliminary for the maintenance of this action, which is based on overpayment of its taxes for 1918 and 1919 on the grounds that its invested capital is a larger amount than was set forth in its return for those years."

[fol. 107] The Court, therefore, disregards the amendments to the claims. It could not have held that a proper amendment filed before the claims were rejected was barred by the Statute of Limitations. Under every authority such an amendment dates back to and is part of the original claim.

B. By the foregoing error in the facts, the Court is led into erroneous analysis of this entire question. The Court quotes from the case of Mutual Life Insurance Company of New York v. U. S., 40 Fed. (2d) 662.

If the quotation is offered on the proposition that the amendments to the claim are not to be considered, it is in point only under the misapprehension of facts above referred to.

That case holds only that a suit cannot be maintained for relief which was never sought from the Commissioner of Internal Revenue at a time when he still has jurisdiction of the claim. The amendments asking such relief were not filed in that case until "*long after he rejected the claims.*" A suit on a claim is an appeal from the Commissioner's rejection of the claim, and the principle applied is that the parties on appeal "are restricted to the theory on which a cause was prosecuted or defended in the court below" (3 C. J., p. 718). That principle has no application in this case, where the amendments were offered before the claims for refund were rejected and passed upon by the Commissioner.

2

The Court's conclusion in this case is directly contrary to the judgment of the United States courts of other districts in the following cases: McKesson & Robbins, Inc., v. Edwards, supra; Factors and Finance Co. v. U. S., 56 Fed. (2d) 902. The opinion makes no reference to said decisions.

3

The Court erred in holding that a claim for refund is not sufficient when it sets forth the facts concerning the matter, because of which a refund is sought, merely because it seeks special assessment by virtue of such facts. In the case of Felt & Tarrant v. U. S., 283 U. S. 289, quoted from by the Court and stated to be similar, no facts were stated. This holding is contrary to the ruling of substantially every other appellate court which has considered similar questions. (See cases cited in original brief.)

[fol. 108] For the foregoing reasons it is respectfully urged that this petition for rehearing be granted, and that the judgment of the District Court be, upon further consideration, reversed.

Respectfully submitted.

Spencer M. Thomas, Stanley S. Waite, Abraham Lowenhaupt, Counsel for Bemis Bro. Bag Company.

We, Spencer M. Thomas, Stanley S. Waite and Abraham Lowenhaupt, counsel for the above-named Bemis Bro. Bag Company, do hereby certify that the foregoing petition for rehearing in this cause is presented in good faith and not for delay.

Spencer M. Thomas, Stanley S. Waite, Abraham Lowenhaupt, Counsel for Bemis Bro. Bag Company.

[File endorsement omitted.]

[fol. 109] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—September 30, 1932

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellant.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

In United States Circuit Court of Appeals

Petition for Stay of Mandate—Filed Oct. 8, 1932

Spencer M. Thomas, Stanley S. Waite and Abraham Lowenhaupt, as attorneys for the above named Bemis Bro. Bag Company, respectfully petition the Court for an order granting an additional stay of the issuance of the mandate to the District Court of the United States for the Eastern District of Missouri.

Your petitioners request that said order be issued to enable said petitioners to prepare the necessary papers in connection with an application to the Supreme Court of the United States for a writ of certiorari.

Spencer M. Thomas, Stanley S. Waite, Abraham Lowenhaupt, Attorneys for Bemis Bro. Bag Company, Appellant.

[File endorsement omitted.]

[fol. 110] In United States Circuit Court of Appeals

Order Staying Issuance of Mandate—October 18, 1932

On consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

[fol. 111] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 112] Supreme Court of the United States

Order Allowing Certiorari—Filed January 23, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,212. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 515. Bemis Bro. Bag Company, petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed November 19, 1932. File No. 37,212.